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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 364

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PETITIONER,

vs.

MISSOURI PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR CERTIORARI FILED SEPTEMBER 12, 1932

CERTIORARI GRANTED OCTOBER 24, 1932

(37,061)

( )

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[fol. 1]

PLEAS BEFORE HON. RICHARD M. MANN, JUDGE OF THE PULASKI CIRCUIT COURT, SECOND DIVISION, HAD ON THE 24TH DAY OF DECEMBER, 1931, IN THE CASE OF

In the Matter of the Petition of THE MISSOURI PACIFIC RAILROAD COMPANY for Authority to Cross the Rails of a Spur Track of the St. Louis Southwestern Railway Company

Appeal from Arkansas Railroad Commission

Order of Arkansas Railroad Commission Quashed and Petition of Missouri Pacific Railroad Company Granted

[fols. 2 & 3] IN PULASKI CIRCUIT COURT, ARKANSAS

No. 23238

In re Petition of MISSOURI PACIFIC RAILROAD COMPANY for Authority to Cross the Rails of a Spur Track of the St. Louis Southwestern Railway Company

Bill of Exceptions

Be it remembered that heretofore, to wit: On the 24th day of December, 1931, same being a regular day of the September Term, 1931, of said Court, the above styled cause came on for hearing before the Honorable Richard M. Mann, Judge of said court, and the following proceedings were had therein, as follows, to wit:

Appearances:

R. E. Wiley, Esq., for Appellant.
N. F. Lamb, Esq., for Respondent.

And said cause was submitted to the court upon a transcript of the proceedings and evidence before the Arkansas Railroad Commission, which transcript is, in words and figures, as follows, to wit:

1—2362

[fol. 4] BEFORE RAILROAD COMMISSION OF ARKANSAS

PETITION OF MISSOURI PACIFIC RAILROAD COMPANY FOR A CROSSING OF THE RAILS OF A SPUR TRACK OF THE ST. LOUIS SOUTHWESTERN RAILWAY COMPANY—Filed Aug. 5, 1930

To the Honorable Railroad Commission:

The Missouri Pacific Railroad Company respectfully shows that it is a corporation organized under the laws of the State of Missouri and lawfully authorized to do business in the State of Arkansas as a common carrier by railroad of freight and passengers in interstate and intrastate commerce and as such owns and operates lines of railroad in the states of Arkansas, Missouri and other states which form a connecting system of railroads as a part of which it owns and operates about eighteen hundred (1800) miles of railroad in the State of Arkansas, including extensive terminal facilities in the city of North Little Rock in Pulaski County in said state.

The National Cotton Seeds Products Company, a corporation, owns a cotton seed oil manufacturing plant located in the City of North Little Rock which heretofore for many years was owned and operated by the Dixie Cotton Oil Company and is known as the Dixie Cotton Seed Oil Mills. Approximately eighty per cent of the business of the said Dixie Cotton Seed Oil Mills is and has been for a long [fol. 5] time handled over the railroad of petitioner, being switched to petitioner's rails by the St. Louis Southwestern Railway Company for a distance of about five hundred (500) feet. To facilitate the handling of said business it was found desirable for petitioner to reach said plant directly with its own rails and the owner of said plant desiring such connection petitioner has acquired a right-of-way for a spur or industrial track connecting with petitioner's existing side tracks thence extending a distance of approximately five thousand four hundred and sixty feet southward and southeastward as to the said plant of the Dixie Cotton Seed Oil Mills. As projected said track will cross a small industrial track of the St. Louis Southwestern Railway Company which serves the Arkansas Power and Light Company's transformer station, said crossing being located at approximately station 43 plus 51 on petitioner's proposed track and at a point on the said spur of the St. Louis Southwestern Railway Company approxi-

mately two hundred and sixty-five (265) feet easterly from its switch connection with the main lead switch (formerly old main line) of the St. Louis Southwestern Railway Company and at grade.

Petitioner's proposed track is a standard gauge, single track and petitioner has surveyed and located said proposed track and made a map showing the same and its relative location to the existing tracks and the Cotton Belt [fol. 6] Spur as aforesaid and the location of the crossing and said map is attached to this petition, marked Exhibit "A" and made a part hereof.

The aforesaid spur track which petitioner desires to cross was built for the purpose of unloading the machinery used in the construction of the said Arkansas Power & Light Company's transformer station and no substantial amount of traffic has since moved over it and the ground is not owned by the St. Louis Southwestern Railway Company, but it owns merely the rails with an easement over the land for said rails. The Arkansas Power & Light Company which is served by said spur has no objection to the crossing. Petitioner is willing to construct a crossing at its own expense and to submit to reasonable terms of operation, use and protection of such crossing as may be found proper for the benefit of all parties entitled to use the same.

Wherefore, petitioner prays that it have a crossing over said St. Louis Southwestern Railway Company's spur track aforesaid for petitioner's proposed track at the point named and at grade and at petitioner's expense of construction and in accordance with the terms of installation, operation, maintenance and protection of such crossing as may be fixed by your Honorable Body upon final hearing of this petition and for all relief to which petitioner may be entitled according to law.

(Signed) R. E. Wiley, Attorney for Petitioner.

[fol. 7] BEFORE RAILROAD COMMISSION OF ARKANSAS

[Title omitted]

NOTICE OF HEARING

Notice is hereby given that the Arkansas Railroad Commission will hold a meeting at its offices, New State Capitol Building, Little Rock, Arkansas at 10 o'clock A. M. on

Wednesday August 20, 1930, for the purpose of taking up for consideration a petition filed by the Missouri Pacific Railroad Company seeking authority to cross the rails of a spur track of the St. Louis Southwestern Railway Company with a spur track more fully set forth on map attached to this petition marked Exhibit "A" and made a part hereof, and on said day the Commission will take such action with reference to said petition as may appear just and reasonable

By order of the Commission.

(Sgd.) Grady Hays, Secretary. (Seal.)

Aug. 9, 1930.

cc. Hon. R. E. Wiley, Gen. Atty., Missouri Pacific R. R. Co., Boyle Building, City; Hon. J. R. Turney, Vice Pres., St. Louis Southwestern Railway Co., St. Louis, Mo.

[fol. 8] Before Railroad Commission of Arkansas

[Title omitted]

Notice of Continuance

Hearing in the above entitled case now assigned for hearing on Wednesday, August 20, 1930, is hereby canceled and said case is reassigned for hearing at the offices of the Arkansas Railroad Commission, Little Rock, Arkansas, at 10 o'clock A. M. on Thursday, September 11, 1930, at which time the Commission will take such action with reference to said case as may appear just and reasonable.

By order of the Commission.

(Signed) Grady Hays, Secretary. (Seal.)

August 15, 1930.

cc. Hon. R. E. Wiley, Gen. Atty., Missouri Pacific R. R. Co., Boyle Bldg. City; Hon. J. R. Turney, Vice Pres. St. Louis Southwestern Railway Co., St. Louis, Missouri.

[fol. 9] Before Railroad Commission of Arkansas

[Title omitted]

Notice of Continuance

The above entitled case now assigned for hearing on Thursday, September 11, 1930, is hereby canceled and said

case is reassigned for hearing at the office of the Arkansas Railroad Commission, Little Rock, Arkansas, at 10:00 A. M. on Tuesday, September 16, 1930, at which time the Commission will take such action with reference to said case as may appear just and reasonable.

By order of the Commission.

(Sgd.) Grady Hays, Secretary. (Seal.)

September 3rd, 1930.

cc. Hon. R. E. Wiley, Gen. Atty., Missouri Pacific R. R. Co., Boyle Bldg., City; Hon. J. R. Turney, Vice Pres., St. Louis Southwestern Ry. Co., St. Louis, Missouri.

[fol. 10] BEFORE RAILROAD COMMISSION OF ARKANSAS

Tuesday, Sept. 16, 1930—10 o'clock, a. m.

Present: Ed Harper, Chairman; Clay Henderson, Reece Caudle, Commissioners.

By Chairman Harper: The Commission is in session, gentlemen, to hear Case No. 783—In the Matter of the Petition of the Missouri Pacific Railroad Company for authority to cross the rails of a spur track of the St. Louis Southwestern Railway Company. Enter your appearances, please:

Appearances:

R. E. Wiley, C. E. Daggett, representing Missouri Pacific Railroad Co.

A. H. Kiskadden, Adair Dyer, representing St. Louis Southwestern Ry. Co.

By Mr. Wiley: If the Commission please, this is a petition by the Missouri Pacific Railroad Company for an order of the Commission to approve a crossing of track which they propose over a spur of the St. Louis Southwestern Railway in North Little Rock. Prayer of petition [fol. 11] is that petitioner have a crossing over said St. Louis Southwestern Railway Company's spur track aforesaid for petitioner's proposed track at a point named and at grade and at petitioner's expense of construction and in

accordance with the terms of installation, operation, maintenance and protection of such crossing as may be fixed by your Honorable Body upon final hearing of this petition and for all relief to which petitioner may be entitled according to law.

Now the petitioner, your Honor, recites that it has a proposed track to reach the plant of the National Cottonseed Products Company, a corporation, the plant formerly owned and operated by the Dixie Cotton Oil Company, and known as the Dixie Cottonseed Oil Mills in North Little Rock.

I wish to have it understood that we amend that allegation to the extent of saying that it is an industrial lead throughout its entire length, for the service of the public generally and operation and serving of industries that may be located in this new territory, and I would like to have the right to file an amendment to that effect, if it is necessary. Our proof will be directed to that effect.

By Mr. Kiskaddon: We object to that amendment on the grounds that it is a material change and we have prepared our case to meet the petition filed.

[fol. 12] By Chairman Harper: What ground did you say?

By Mr. Kiskaddon: It is a very material amendment—it has a different theory in the case altogether. It would be proper, yes, if made sufficiently in advance to apprise us of it being made, but here at the eleventh hour with witnesses present and all parties ready for the trial, it is taking us by surprise. I do not think Mr. Wiley intends to be unfair, but it is.

By Mr. Wiley: I do not intend to be unfair and do not think it is—it is the track in the same place, with the same service and could hardly be different, regardless of that allegation as to the purpose of the track.

By Mr. Dyer: Conditions are entirely different on a public track and private industry track.

By Mr. Wiley: I do not consider it so and I do not want our petition confined to the ownership of it. I do not think it has any bearing over the right, authority and jurisdiction of this Commission. I do not think one or the other really bears on this because this Commission really passes on the question of whether there is to be a crossing or not. If there is any attack to be made on the right to the purpose of

[fol. 13] the crossing it has to be a judicial question, I understand.

By Commissioner Caudle: What matters should we take into consideration as to whether or not you should be permitted a crossing?

By Mr. Wiley: The fact whether we are a corporation authorized to have a crossing and the elements of public safety and whether it ought to be a grade crossing and the point and manner of the crossing.

By Comm'r Caudle: What happens beyond the crossing on the lead track or industrial track or whatever you call it—you think that does not enter into the question of the crossing at all?

A. I do not believe it does, and that was the theory on which this petition was drawn, but I do not want to foreclose ourselves. I want the facts to come out, in other words. There is no use in confining it down to a particular thing when the facts are a lot broader and that is the purpose we expect to show and filed an amendment for that purpose.

By Mr. Kiskaddon: Mr. Wiley's statement indicates the ground of my objection. We are prepared to meet the peti- [fol. 14] tion in the language in which it is drawn now—he says he does not want to confine himself to that petition, but wants to broaden it. That might make a material change in our testimony.

By Mr. Wiley: How can it, Mr. Kiskaddon?

By Mr. Kiskaddon: Because we are going on the theory—now this petition—if I am wrong, I wish you would correct me—is for a crossing only over a spur of the St. Louis Southwestern Railway and you now are broadening it by asking for authority from this Commission to build an industrial spur track, which is a totally different thing.

By Mr. Wiley: We are broad-ing it merely to show that testimony will show as to the purpose of the track described in there—not changing the track at all, nor its location. We are just asking for a crossing at the point named in the petition, but want to advise are Commission and counsel that the purpose of the track is not confined to serve the National Cottonseed Products Company, the Dixie Oil plant, but it is an industrial lead that covers anyone who goes in there and asks for it.

By Mr. Kiskaddon: I could not make a better argument than that.

By Mr. Wiley: We are asking the Commission to grant [fol. 15] us permission to cross that same point with this track, your Honor, the respondent here has not filed any pleading to demur to this petition.

By Chairman Harper: The Commission doubts ver- much whether they are prepared to sustain the change. We are going to sustain the objection there.

By Com'r Caudle: You can ask for permission to continue the case and amend your petition, if you want to. I can see why you would want to bring that out in your proof—it might be a matter that would enter into the whole thing, but if they have come here prepared on a certain petition, then you seek to broaden it to the extent that it would take them by surprise, they would not be prepared to meet the proof you have put in the record.

By Mr. Wiley: Does that mean we would not be permitted to offer proof on those points?

By Mr. Kiskaddon: We will object to proof on that.

By Commr. Caudle: If you did, we would have to give time for them to come back and answer, provided they wanted time.

By Mr. Dyer: We would object to any proof as to building of a public track——

[fol. 16] By Mr. Wiley: I think, Your Honors, we will go ahead and offer the proof——

By Chairman Harper: Offer proof on what, Mr. Wiley? On this amendment?

By Mr. Kiskaddon: That, of course, we must object to.

By Com'r Caudle: We might proceed on the theory that you would offer your proof along the lines of your petition.

By Mr. Wiley: That is what I mean. All right, we will do that.

By Chairman Harper: Are you ready to proceed with the case?

By Mr. Dyer: The St. Louis Southwestern Railway is opposing the application.

* * * * * * *

[fol. 17] Mr. A. D. May, after first being duly sworn, testified as follows:

Direct examination.

Mr. Wiley:

Q. What is your name?

A. A. D. May.

Q. What is your occupation?

A. Assistant Engineer, Missouri Pacific, Arkansas Division, Little Rock.

Q. As such, are you familiar with the territory and location of the proposed track named in this petition?

A. Yes, sir.

Q. Have you made an examination of the territory and the track location where it is to be built and where it is proposed to cross the Cotton Belt spur, and have you made a plat of it?

A. Yes, sir. I have a plat on 100′ scale to the inch, showing the horizontal projection, also profile on the same on the 100′ horizontal scale 4′ vertical, as well as a detailed plan of the proposed crossing itself.

Q. Please exhibit this, first the plan. Now, describe that, the location of that track where it breaks and where it leads to and the territory it runs to, so the Commission may understand it—referring to this plat.

A. Leaving the northward main line of the Missouri Pa-
[fol. 18] cific about 300′ northeasterly from the west line of section 30 and then in a generally southeasterly direction until it comes parallel to the range line, then south following the range line to 25′ east of it to the drainage canal, and then turning again in a southeasterly direction across the property of the Arkansas Power and Light Company until it comes parallel to the St. Louis Southwestern right-of-way and just north of it, crossing the spur of the St. Louis Southwestern Railway into and upon the property of the Arkansas Power and Light substation, and thence continuing on east to where it will join the existing tracks of the National Cottonseed Products Company and serve other land in that vicinity.

Q. What township and range is that section 30 that you have mentioned?

A. Township 2 north, range 11 west. All the track lays, it is parallel with the range line between 11 and 12, but all property lays in 2 north, range 11 west.

Q. What is the distance, the length of track and distances to points you named, so as to locate it? What is the length of the track?

A. The length of the track over to connection of the National Cottonseed Products Company is surveyed down to the ground 5187' long.

Q. What is the distance from where it leaves your main line down to the point to where it is proposed to cross this [fol. 19] Cotton Belt spur?

A. 4338.4'.

Q. What is the distance from where it breaks out of your main line down to where it changes direction from south direction to southeasterly direction?

A. 3519.65'.

Q. Describe the track, gauge and general physical condition as proposed.

A. It is an industrial lead track, meaning main track from which industrial tracks may be constructed.

Q. As such it would be in shape for movement of cars from the industry track to the main line?

By Mr. Dyer: We object to that and ask that it be stricken. The allegation has to do with a private industry track and not industrial lead.

Mr. Wiley:

Q. Well, what kind of track is it?

By Chairman Harper: That may be stricken out—the first question that he is objecting to.

By Mr. Wiley: You are going to rule that out? Alright, save our exceptions on that. That is not what I meant to ask him.

Mr. May:

A. Standard gauge track fit to operate over it any equipment the Missouri Pacific owns and operates.

Q. Can you locate the particular point where you want this crossing any more definitely than you have?

[fol. 20] A. The center line of the proposed track crosses the center line of the Cotton Belt's industrial track into and

along the land of the Arkansas Power and Light Company, at station 43 x 38.4 and is at a point 10½′ northerly from the north right-of-way line of the Cotton Belt old main track—used to be their track.

Q. That is shown on this plan that you have filed?

A. Yes, sir—at the point indicated by the pencilled arrow.

Q. What is the character of the territory occupied by this proposed track, as to being level or otherwise?

A. Very level property, drained by drainage canals—lays between two of the main drainage canals of the Pulaski County Drainage District No. 1—open except for a tenant house or two and cotton house, down to the canal.

Q. That is you mean it is unimproved—has no improvements on it at all?

A. No, sir. It is level farm land or land that has been in cultivation recently.

Q. Now, with reference to the possibility of anything besides a grade crossing there, what is the character and condition of the land and surroundings at the point of crossing?

A. Even with the drainage canals, it is impossible to make an under-grade crossing and secure drainage for it, because to depress the track to sufficient under clearance under the Cotton Belt track would be unnatural drainage [fol. 21] and the Arkansas River would back up and go overhead, place the construction overhead, it would be impractical. To go over it and try to come down, would have too steep a grade, too sharp a grade to come down, and at that elevation would not serve any ground in the vicinity of the property.

Q. What about the expense?

A. It would be practically prohibitive, on account of lifting the grade at natural ground.

Q. Are you familiar with that Cotton Belt spur that is proposed to cross over?

A. Yes, sir.

Q. How long is it and where does it reach from and to?

A. It is a spur leading from the Cotton Belt old main track, former main track, in an easterly direction about 570′ long. We are crossing at a point 265′ from its point of switch and before the track serves any purpose for the Arkansas Power and Light Company—in other words, it is

crossing at a point in the connection from their main line to the point where they go over that track to give service to the Arkansas Power and Light, if called upon.

Q. Do you know how much use at the present is being made of that Cotton Belt spur?

A. Well, they have told me they were not using it and by present observations and rust on the rails, etc., I could tell the track had not been used recently and was not regularly [fol. 22] used—in other words, it was a track that was constructed and practically all business ever received over it was handled at the time the Arkansas Power and Light plant was built, bringing in materials for the construction and since that time they thought they might have had one transformer over this track in a car.

Q. It is not a track that is used in routine switching, day by day?

A. No. Probably has not been used for three or more months.

Q. Now, we would like to introduce this blue print of the plan.

(Print introduced in evidence as Exhibit No. 1—witness May.)

Q. Have you a profile?

By Mr. Kiskaddon: May we have a copy of this exhibit before we go to the next one, please?

By Mr. Wiley: All right.

By Mr. Kiskaddon: This will be exhibit what?

By Mr. Wiley: Exhibit 1.

Mr. Wiley:

Q. Now, have you a profile of the proposed track?

A. This is a profile of the proposed track—station on the profile being the same as on the map and the elevations being above means off level.

Q. Have you a copy of that for counsel?

A. Yes.

Q. We would like to introduce this profile as Exhibit No. 2.

(Profile filed in evidence as Exhibit No. 2—witness May.)

[fol. 23] Q. Have you also a plat of the crossing frog?

A. Yes, sir.

Q. What does that show?

A. It shows the angle of the crossing, detail of the location and the ordinary information from which a frog and switch company manufacture crossings—all the details that they need in connection with our standard plans for construction of a raliroad crossing frog.

Q. Is that what you are proposing to put in there?

A. Yes, sir.

Q. Please introduce that as Exhibit No. 3.

(Plat introduced in evidence as Exhibit No. 3—witness May.)

Q. Take the witness.

Cross-examination.

Mr. Dyer:

Q. You do not mean to testify that this Cotton Belt spur track has been abandoned, do you?

A. The use of it seems to have ceased, by the rust on the rail.

Q. The plant of the Arkansas Power and Light is there opposite it still?

A. Yes, but their need of the spur seems to have practically come to an end, outside of an emergency breakdown.

Q. If they need any more transformers or heavy machinery, whenever they do the track will be useful, won't it?

A. Yes, if it does not deteriorate.

Q. And we will have a use for it then?

[fol. 24] A. Yes, that or another track.

Q. This track that is proposed, for instance. Do you have any agreement with the Cotton Belt about crossing that spur track?

A. Not that I know of sir.

Q. Have you instituted or prosecuted any condemnation proceedings to require a right to cross the track?

A. That is what I understood this hearing was for.

Q. As far as you know, this is the only proceeding that has been filed by the Missouri Pacific to acquire the right to cross the Cotton Belt tracks?

A. No, I knew there was other negotiations under way and I understand consummated to construct track upon the ground upon which the Cotton Belt spur also rests, which belongs to the Arkansas Power and Light Company.

Q. But you do not know of any negotiations with the Cotton Belt?

A. No, sir.

Q. Now, this track will be built from the Missouri Pacific crossing southeast to the spur track of the Cotton Belt?

A. The general direction of the track would be south.

Q. It runs about 4000′ before it crosses the Cotton Belt spur track?

A. Yes, sir.

Q. And after you cross the Cotton Belt Spur track with it, you propose to parallel the Cotton Belt old main line [fol. 25] track for about 1000′ up to the Dixie Cotton Oil plant?

A. Yes, sir, that is one of the possibilities of the track construction beyond the crossing.

Q. Do you have any contract or agreement with the Dixie plant about the construction of this track?

A. I do not know of any written contract. I have had some conversations with some of the officials of the Cotton Oil Company, though, that indicated they were negotiating for this track.

Q. Now, you said that you expected to connect with tracks at the Dixie Cotton Oil plant. What tracks do you expect to connect with up there? Have you a blue print or anything showing that?

A. This plat indicates that.

Q. Where does it indicate that? Will you point it out on here?

A. Points A, B, C.

Q. Who does this track belong to that you propose to connect with here?

A. Track A, the map that was furnished me indicates that belongs to the National Cottonseed Products Company.

Q. Do you have any agreement with the National Cottonseed Company in order to connect with that track?

A. We have verbally. I do not know of any written agreement. Their manager pointed out they wanted that. [fol. 26] Q. Who does track B belong to?

A. Part Cotton Belt, part Rock Island and part private according to their map. I could not tell by looking at the rails as to who it belonged, neither did their local manager know.

Q. Would you say that track at point of connection does not belong to the Cotton Belt?

A. No, I would not say. I do know the manager of the oil company wanted it connected there.

Q. Do you have any agreement with the Cotton Belt or Rock Island or anyone else to connect with that track?

A. No, sir, I have not.

Q. How do you propose to serve the Dixie Cotton Oil Mill with this track as alleged in the petition without any right or agreements to connect with those tracks?

A. Just the same as we do when we go out to work up an industrial track to serve industries—we ask them where they want to be served and it is pointed out.

Q. Before you construct these connections, you have to have some sort of agreement with the parties?

A. I do not have any negotiations with them.

Q. Is this track to be built at the expense of the Missouri Pacific?

A. The lead track, I understand, is—the industrial connections, I do not have that.

Q. That is all.

[fol. 27] Redirect examination.

Mr. Wiley:

Q. By the lead track, you mean the track reaching clear down to the boundary of the Dixie property?

A. Yes, sir, the main lead from which other switches would lead, even beyond that.

Q. That is the track you had reference to in describing as 5187'?

A. Yes, sir.

Q. And terminating at what point? Please indicate it on the map.

A. Point A terminated the main switching lead, from which other industrial tracks might be constructed, as joining National Cottonseed track at point A—a private track.

By Mr. Dyer: I wish you would make that statement again.

A. We designated the main industrial lead 5187' as track from which other industrial track might be constructed and joining the private track of the National Cottonseed Company at point A.

Mr. Wiley:

Q. That is all.

By Mr. Dyer: That is all.
By Mr. Wiley: I had better recall Mr. May.

Mr. A. D. May recalled.

Redirect examination.

Mr. Wiley:

Q. Mr. May, with the crossing installed as you have de-
[fol. 28] scribed it, tell whether or not it will interfere with the use of the Cotton Belt spur track?

A. No, sir, it will not. The Arkansas Power and Light Company's local manager indicated where if any place along there they would spot cars, all of which were beyond, and would not conflict with this crossing.

Q. And the crossing frog you have proposed there will permit the use by the Cotton Belt in the way of switching that track in the regular way?

A. Yes, sir, it will.

Q. What do you say, Mr. May, with reference to the need, if any, there for protecting with crossing gates or other methods?

A. Unless there is more use of the spur than indicated on the ground, there would not be any protection necessary, but even at that it is all open—nothing to prevent you from seeing a Cotton Belt train if it should be approaching this place, for a quarter to half a mile in each direction, and of course, even then they would have to stop and open the switch and that would give time to make any moves for protection, and they can have the same view of the Missouri Pacific, except it would not be half a mile east, it would be half a mile north, and east would be only when you were beyond place and plant of the National Cottonseed Products Company, and that would be about a thousand feet.

[fol. 29] Q. And it is open east for a thousand feet, as far as that proposed track is concerned?

A. Just about.

Q. And the Cotton Belt track is entirely open and unobstructed?

A. Yes, sir.

Q. And your track would be open and unobstructed for the whole 4000′ northward to the connection?

A. Telegraph pole is the biggest thing in the way.

Q. That is all.

Recross-examination.

Mr. Dyer:

Q. Did I understand you to say you propose to serve the Arkansas Power and Light Company with this track?

A. Why, yes.

Q. Have you the right-of-way to build the track all along the way?

A. I do not know, but I understand so. I have been told arrangements were made.

Q. Do you know anything about whether there are any restrictions on that right-of-way anywhere?

A. I have heard of none, no, sir.

Q. You do not have any plans to construct this anywhere except to the Dixie Cotton Oil mill?

A. We have had no other application that I know of and this plan only covers the industrial lead.

Q. What is there to the north of the track, for the [fol. 30] thousand feet that it parallels the Cotton Belt?

A. There is a large open tract owned by the Dixie in receivership, which can be served off this, also open ground still owned by the National Cottonseed Company which they are not using and there is a triangle which is owned by the Arkansas Power and Light Company, which could be opened for Arkansas Power and Light occupancy, and on the north of the Dixie plant, clear to the junction with the Rock Island would be an almost inexhaustible, at least several times as much open property as we have on the first 4000′ of that track.

Q. How far is it to the Rose City Cotton Oil mill?

A. It is across the Rock Island track and about half a mile. I have never measured that—have walked it. That is southeast and this industrial property lays to the east and northeast.

Q. As I understand your petition, this track is to be built as a private industry track to serve the Dixie Cotton Oil Mill?

A. I do not know anything about the petition, but I have always understood that it is to be an industrial lead track.

Q. That is all.

Redirect examination.

Mr. Wiley:

Q. You understand when you say industrial lead track that it is not a track primarily to serve one industry, but [fol. 31] a track that is capable and constructed to serve industries and develop property of more than one industry and keep on expanding and bringing in business. In other words, it is an artery to a territory. How could this track develop and serve the territory that you mentioned in answer to counsel's cross-examination?

A. No. 10 turnoff like we brought off station 44 and 45. Turn to the left.

Q. Or north?

A. Yes, go to the east and north and open up that property. There is a limit in going to the north of about half a mile where you would be almost as close off the lead track into the Ayer & Lord Tie plant, but all property between the Rock Island main line and National Cottonseed and Ayer and Lord would be served off that and tracks off the track, off of that.

Q. The property you have described lays immediately to the north of the National Cottonseed and Dixie plant?

A. North and east of it.

Q. And is adjacent and adjoins that Dixie plant property on the north?

A. Yes, sir.

Q. Within easy reach, afer it crosses the Cotton Belt.

A. This track if properly located is the best means in and out of that territory.

Q. That is all.

[fol. 32] Recross-examination.

Mr. Dyer:

Q. As I understand your testimony, this track is not to be a private industry track, is that correct? Just inci-

dentally will serve one track of the National Cottonseed plant, but has potential service of that territory—you expect to use this track you pro-ose to build as an industrial lead track to develop this whole territory north and east of the Dixie Cotton Oil mill?

A. Yes, as requirements arise.

Q. You say there is a limit as to how far north you can go. Now this property to the north of the Dicie Cotton Oil — and north of the Cotton Belt track for the distance to which you will parallel the Cotton Belt is open property, isn't it?

A. Yes, sir. It is open property with the exception of the part immediately north of the Arkansas Power and Light where the Dixie sub-division, a negro piece of property is somewhat built up. We swing around that and to the east of it.

Q. But all that is open property?

A. Yes, it is open to the tie plant.

Q. And your plan is this industrial lead will serve all of that property as the necessity arises for as far as half a mile to the north?

A. Yes, sir.

Q. How far to the east is that property capable of running?

[fol. 33] A. To the Rock Island main track, unless it should be crossed. It is physically possible to cross the Rock Island main track, but it is open without that difficulty for immediately north of the National Cottonsed Products Company of about 1700′ and becomes wider toward the north.

Q. You could even cross the Rock Island track and go farther east with it?

A. It is physically possible, yes, sir.

Q. Do you propose to do that?

A. We have no necessity or obligation for even making anything more than a reconnaissance just to look it over.

By Mr. Kiskaddon: You have done that?

Mr. Dyer:

Q. Have you made a survey over there, with a view of farther extending the track or possibly extending it.

A. Just a reconnaissance—I mean just as I have over the property east and west and in this vicinity.

Q. What about the property east of the Rock Island?

A. I looked a good bit more closely at the property west and north of the Rock Island than on the other side—did not know there was any need there.

Q. But you have looked over the property east of the Rock Island?

A. Yes, or east of the Cotton Belt.

Q. Have you determined whether or not it is feasible to build this track on east of the Rock Island and south of the [fol. 34] Cotton Belt, to serve that territory?

A. It would depend on the demand.

Q. If the demand decided it, it could be done?

A. Yes, it would be perfectly practical and feasible. I think that is an ideal way to get into that territory.

Q. How far could it be built east?

A. There is a limit to industrial lead where it would become a main line—if — have to have passing tracks, it would become a main line if extended so far.

Q. Could you build the passing tracks?

A. Yes, sir.

Q. How far are the limits on the east?

A. That is the territory we have just described. It is within the ordinary limit of a lead.

Q. How far east of the Rock Island, in the vicinity of the Rock Island? How far could you build it to get service south of the Cotton Belt?

A. On account of the developments along State Highway 67 and 70, there would be a limit there for industrial uses, would not go beyond the Cotton Belt.

Q. Now, these industrial leads that you talk about, the sub-leads that you expect to build off of this main industrial track, do you expect to build those at your own expense?

A. I do not know sir. They are not in this A. F. E.

[fol. 35] Q. You have not as yet been authorized to build them?

A. No, sir.

Q. That is all.

By Mr. Wiley: That is all.

[fol. 36] Mr. V. I. NETTLETON, after first being duly sworn, testified as follows:

Direct examination.

Mr. Wiley:

Q. Your name is V. I. Nettleton?

A. Yes, sir.

Q. What position do you hold with the Missouri Pacific Railroad?

A. Right-of-way agent.

Q. Are you familiar with the location and the territory, the track that is described by witness May in his Exhibit No. 1?

A. I am, yes, sir.

Q. State whether or not the Missouri Pacific has acquired the right-of-way for that spur track?

A. The right-of-way has been acquired—50′ strip from our main line south to the Dixie sub-division. This entire Block 30 has been acquired as an industrial site and negotiations are being carried out under contract with the Arkansas Power and Light to give us from here south a 240′ strip clear down to the Cotton Belt right-of-way and a 19′ strip along and adjoining the Cotton Belt right-of-way on the north, through the plant of the Arkansas Power and Light Company. They have cooperated with us and made an agreement with us to convey this property to us in exchange for some property we are acquiring for them here.

Q. Perhaps you had best describe it by some purpose [fol. 37] on the map, so the record can show better where you were pointing when you were describing that.

A. Strip of right of way 50′ on the west side adjoining sections 30 and 31 extending south to Dixie Park annex. All of block 30 Dixie Park Annex.

Q. That has been acquired?

A. That has been acquired.

Q. Then the strip 240′ wide that you noted is where?

A. Is located in Dixie Park annex and Dixie sub-division annex 10 south from block 30 of Dixie Park annex to the west and east center line of section 31, township 2 north, range 11 west, and also south from there to the northerly line of the right of way of the Cotton Belt. Then southeasterly from this 240′ strip the right-of-way is to be 19′

wide approximately and extending southeasterly along and adjoining the northerly line of the Cotton Belt right-of-way across the property of the Arkansas Power and Light Company.

Q. Take the witness.

Cross-examination.

Mr. Dyer:

Q. Have you personally handled these negotiations?

A. I have personally handled them and part have been handled by one of my assistants.

Q. As I understand it, you have right-of-way down to the Arkansas Light and Power and you have only a verbal [fol. 38] agreement with the Arkansas Power and Light Company to cross their property?

A. No, sir, I think it is a written agreement. I have not it myself, but I saw a copy of it.

Q. You do not have the actual executed easement?

A. No, sir, it has not been granted.

Q. Do you have any agreement with the Cotton Belt about crossing its spur track?

A. None whatever, that is why we are here. The spur track is not located on Cotton Belt property. It is on the property of the Arkansas Power and Light Company, over which the Cotton Belt has easement for its trust.

Q. Anyway, you know the track is there and it belongs to the Cotton Belt and you have no agreement with the Cotton Belt to cross it?

A. No, sir.

Q. And you have instituted no condemnation proceedings against the Cotton Belt to procure right-of-way across it?

A. Not before this court.

Q. The only proceedings that you have instituted are proceedings instituted here?

A. Yes, sir—so far as I know.

Q. Do you have any agreement with the Dixie Cotton Oil Company to go into their plant and connect with tracks there?

A. None that I know of.

[fol. 39] Q. Do you know who the tracks belong to that you would have to connect with up there?

A. I do not.

Q. Have you gotten any right-of-way for any extension of this track by leads to the north nor northeast or south?

A. Nothing, no, sir.

Q. You have made no effort to get any such right-of-way?

A. No, sir.

Q. That is all.

Redirect examination.

Mr. Wiley:

Q. That territory that counsel has just described to the north, asking if you had got any right-of-way in there is, as I understand it, the territory immediately north of the Dixie plant and adjacent and adjoining on the north and from there following northward and eastward. Is that the way you understood his question?

A. Yes, sir.

Q. That is property adaptable to industries and the location of plants there?

A. Yes, sir, not of itself, of course. Our purchasing this right-of-way and paying for this track shows it is an industrial lead for private tracks. We bought this right-of-way and purchased this, of course, with the intention of developing this territory.

[fol. 40] Q. You say that you have an arrangement with the Arkansas Power and Light Company for the acquiring of this 240′ strip east of the track?

A. Yes, sir—240′ wide, east of the section line.

Q. What kind of property is that 240′ strip and the Block 30 of that Dixie annex addition?

A. It is open property—however, is divided into lots and blocks.

Q. Vacant land, unimproved?

A. Yes, sir.

Q. Is that adapted to industry purposes?

A. Well, there is no purpose that the 240′ strip could be used for in that neighborhood. That is the reason we bought this entire block.

Q. At the point of the proposed crossing of the Cotton Belt spur, the land is the land of the Arkansas Power and Light Company?

A. Yes, sir.

Q. You do not know who the track belongs to, I suppose that is called the Cotton Belt spur?

A. I have seen what is purported to be the copy of a contract with the Arkansas Power and Light, which would indicate that the track belongs to the Cotton Belt. The light company, however, thought it was their track, but I think after the contract, there is no question but what it belongs to the Cotton Belt.

[fol. 41] Q. But the ground itself belongs to the Arkansas Power and Light Company?

A. Yes, sir.

Q. That is all.

Recross-examination.

Mr. Dyer:

Q. You have spoken of this vacant property north of the Cotton Belt track and this proposed track and west of the Rock Island—how much property is there in there that is susceptible to industrial developments?

A. I have not spoken of any property west of the Rock Island.

Q. You were asked about this property. Is not that west of the Rock Island?

A. Well, it is northwest.

Q. That is the property I am talking about. How much of that property is susceptible to industrial developments?

A. I would not attempt to say. I do not know.

Q. Considerable amount?

A. Yes, sir.

Q. And you expect to eventually to develop an industrial district there and serve all that property from this track?

A. I would not even make that statement. That is future development. It is possible this track is built as a development of this territory right in here—as to track [fol. 42] beyond there, that is a future proposition that has not been authorized, but it is a possibility.

Q. Describe the property you have a present intention of developing?

A. It is Block 30, this 240' strip down through here and to serve the Arkansas Power and Light, if required.

Q. Now, then, your present intention then, takes in service of the Dixie Mill, the development of this property

here, the 240′ foot strip and this triangle and also service of the Arkansas Power and Light Company, if required?

A. Yes, sir.

Q. That is all.

By Mr. Wiley: That is all.

[fol. 43] Mr. R. E. Warden, after first being duly sworn, testified as follows:

Direct examination.

Mr. Wiley:

Q. Your name is R. E. Warden?

A. Yes, sir.

Q. What position have you with the Missouri Pacific Railroad?

A. Engineer of Public Improvements.

Q. Are you familiar with the proposed track and its location, described in Mr. May's exhibit No. 1?

A. As a general proposition, yes, sir.

Q. Did you or not obtain for the purposes of the right-of-way and a location of that track permission to cross a public drainage ditch?

A. Yes, sir.

Q. What improvement district and ditch is that?

A. That is Pulaski County Drainage District No. 1 and this proposed track will cross what is known as the east drainage ditch of the district.

Q. For the railroad company, you acquired permission and right from that improvement district to carry this track across that ditch?

A. Yes, sir.

Q. Take the witness.

By Mr. Dyer: No questions.

[fol. 44] Mr. W. E. Brooks, after being first duly sworn, testified as follows:

Direct examination.

Mr. Wiley:

Q. What is your name?

A. W. E. Brooks.

Q. What position have you with the Missouri Pacific?

A. General Superintendent of the Southern District, headquarters Little Rock, Arkansas.

Q. Are you familiar with the proposed track crossing of the Cotton Belt spur, asked for in this petition and described in Mr. May's exhibit No. 1?

A. Yes, sir, I think I am.

Q. Are you familiar with its purposes and intentions?

A. Yes, sir.

Q. In a general way, just tell the Commission where that track is—what site it is in and where located with reference to the City of Little Rock.

A. It is a track that is supposed to break out of the Missouri Pacific main line of the Arkansas Division, I do not know the exact mile post, but it is north of the North Little Rock terminals of this company.

Q. That is in the city of North Little Rock?

A. In the city of North Little Rock and parallels this section line.

[fol. 45] Q. Moving southward?

A. Southward to a point where it comes to the right-of-way of the old Cotton Belt main line. Then it turns eastward, passes through property of the Arkansas Power and Light Company to the boundary line of the National Cottonseed Products Company, known as the Dixie Oil Company's plant.

Q. What is the character of the territory and the character of the track and the character of the crossing of the Cotton Belt spur that is proposed there, Mr. Brooks, from a railroad operating standpoint?

A. The character of the territory is almost entirely upon undeveloped country, suitable for industrial development, and the character of the track is an industrial lead which is constructed by all railroads as circumstances deem necessary or advisable, from which industries are served and to serve industries. There is at the present time no industry that we would serve on that track if and when constructed

except the Dixie plant of the National Cottonseed Products Association. There has been a very substantial development of business to and from that industry at points on our line.

Q. Now, with reference to the character of the crossing and the tracks there, from an operating standpoint, just what is proposed by your company, if the crossing is granted?

A. If the crossing is granted, we propose to cross with an ordinary crossing frog. We do not at this time, at least, [fol. 46] contemplate any tracks within that property that would enable us to serve that property. We would not be able to serve it with the crossing we propose and this is an industrial lead and there is a private track, I suppose, in ther- on the property of the Arkansas Light and Power Company, and has no other industries on it—supposed to be constructed exclusively for that industry, therefore, the movement over it is irregular and not heavy.

Q. Describe the character of that spur track of the Cotton Belt that you are asking to cross. Now it is located on the ground and its relation to the surraunding territory that it runs through.

A. It is depressed track that depresses sufficiently to bring the deck of a flat car or box car on a level with the concrete pavement of land on which to handle heavy machinery.

Q. By depressed you mean it is sunken below the general contour of the surrounding ground?

A. Yes.

Q. It is adapted for what purpose from a railroad operating standpoint?

A. To place cars containing heavy machinery and stuff like that that goes into that plant—the transformer plant of the Arkansas Light and Power Company.

Q. Describe that a litte more fully. What is a transformer plant and what is this transformer plant? What do [fol. 47] you mean by transformer plant?

A. That is one of the main electrical distribution stations from their power plant that distributes electrical current over various lines. I do not know what the voltage is—that is a matter for an electrical expert—I understand about 23,000 volts on maximum high power line.

Q. It does not handle any product in and out?

A. Nothing except the interchange of machinery in case of a breakdown or a piece of machinery that has been worn out.

Q. Its product is electricity entirely, and that is distributed without the operation of any railroad?

A. Yes, sir.

Q. Distributed through transmission lines?

A. Yes, sir.

Q. The electricity is merely carried in there and distributed and there is no other product in and out of there at all except the machinery for that purpose?

A. That is my understanding, that there has never been anything else but that kind of machinery handled on the track.

Q. Now, what does the condition of the track as you have seen it, if you have observed it, indicate with reference to the routine switching on that track?

A. It has the appearance at this time of not being used very frequently.

[fol. 48] Q. What could it be used for, with reference to the transformer plant of the Arkansas Power and Light Company?

A. Well, if they desire to replace any piece of machinery that is there now, they would use it for the new machinery and possibly to take the old piece out, or if they intended to expand their plant—that is enlarge the capacity.

Q. What is the character of the service that your company will make over that crossing, if permitted?

A. Generally, that is outside of the cottonseed season, I do not think we would make more than one trip each way a day, but during the movement of cottonseed, we would probably be called upon for service more often than that, perhaps two and three times. The business of that plant to and from points on our line has increased very materially within the last few years and while we have never served them directly, we have been put to considerable expense in taking care of switching charges on cottonseed that we have delivered to our connection.

Q. When you refer to "that plant" in your answer, you are referring to the Dixie plant of the National Cottonseed Products Company?

A. Yes, sir—that is the only industry that will be located on that spur to start with.

[fol. 49] Q. Tell the Commission whether or not there is anything in your proposed crossing that will obstruct or substantially interfere with the use of the spur by the Cotton Belt for switching.

A. There is nothing in connection with our track that will interfere with the efficiency of the track, either to the plant or to the owners of the track. Nothing that will interfere in any way.

Q. Is there any necessity for any special protection of the crossing?

A. No, sir.

Q. Why?

A. Well, the use of it will be very light to start with. Any increase that might occur there and above the present cottonseed movement will depend entirely on the future. That is the only plant down that way now that any development has been made in the shape of railroad traffic that we can touch or expect to touch and our service over there will probably be one trip each way a day, except during the cotton[illegible]d movement, when we might be called upon for 2 or 3 [illegible]and-trips or 2 or 3 trips in each direction. It is open country. The view is not obstructed in any way. The appearance of the track indicates the Cotton Belt do not use it very *v*requently.

By Mr. Kiskaddon: We are not making a point that the [fol. 50] crossing if granted, has to be protected.

By Mr. Wiley: All right. Take the witness.

Cross-examination.

Mr. Dyer:

Q. Describe the potential industrial property that you say can be served by this industrial lead.

A. I do not think I can give it to you in acreage, but it looks to be good industrial property and it is apparently the next territory directly in line of development. It is capable of any kind of industry and the water supply is easily obtained. I am not an industrial engineer—we have only considered the possibilities of the territory and what we believe to be the immediate prospects.

Q. That territory is not now served by the Missouri Pacific?

A. No, not between the Ayer-Lord Tie plant, that must be a half or three-fourths of a mile fa-ther north from this connection, near the Argenta Termi[illegible]al line, which runs southeasterly from the main line out to half a mile or three-fourths of a mile farther southwest from this connection. I should say that the total amount of open territory between the existing tracks would be probably a mile and a half and this will come very near splitting it half in two.

Q. Now, to get more down to detail, describe the property in here that the Missouri Pacific has purchased for industrial development.

[fol. 51] A. If I recollect correctly—I have had nothing to do with this transaction in here and my information is confined solely to the blue print. This track will be about a mile long altogether. It will be 140′ over a mile, 5387′—something like that.

Q. After it crosses the Cotton Belt spur that is involved here, it extends about a thousand feet adjacent and parallel to the Cotton Belt old main line track—is that right?

A. I am not familiar with the distance, but it parallels the Cotton Belt main line from there to the intersection contemplated with the Dixie Cotton Oil plant.

Q. Can you say from the map substantially what the distance is? Can you tell from the map? I mean this distance down here.

A. It looks like it is 696.43′—wait a minute. That is a fair estimate I think.

Q. And this property to the north of where the two tracks would parallel is vacant property, isn't it—open property?

A. To the north is the Arkansas Power and Light Company in there and I believe that is the Dixie Cotton Oil property over there.

Q. That property is all susceptible to development, isn't it?

A. I do not think this is. This will be taken up, I expect, by the expansion of the transformer plant. That part, I have no idea what those people contemplate with that, but it is susceptible of accom-odating industries—the expansion of their plant.

[fol. 52] Q. Do you have any agreement with the Dicie Cotton Oil Mill to connect with their plant?

A. We have a request from them for service.

Q. Do you know who these tracks belong to that you propose to connect with up here, on this map?

A. Yes, I believe one is the Rock Island and one is the Cotton Belt—they are all built on the industry's property.

Q. The industry is now served by the Rock Island and Cotton Belt?

A. Yes, sir.

Q. Do you regard this industrial lead track as a private track or public track?

A. We regard this track that we propose to construct right now as an industrial lead. All of our blue prints show it as an industrial lead and are so lettered. If there is anything about a private track in it, I do not know anything about it.

Q. That is all.

Redirect examination.

Mr. Wiley:

Q. He asked you if you regarded it as a public or private track. You regard it as which?

A. I regard it as an industrial lead from which we can break out private tracks and serve any industry that may be successful in locating along that. It is really a public track. We will haul anybody's business over it.

[fol. 53] Q. That is the way you regard it?

A. Yes, sir, that is the way it has been so referred to in all of our negotiations concerning it.

Q. Now, the property, this over here as you described it, pointing on the map, in answer to counsel's cross-examination, which you said would accom-odate industries, you were pointing to the property right immediately north of and adjoining the Dixie plant?

A. That is the piece of ground he had in mind when he put his finger on it.

Q. I want to get it in the record. That is the property right immediately north of the Dixie plant?

A. Yes, sir.

Q. And it could be served by this track that you are proposing by extending it or building tracks from it?

A. By a switch-off of this proposed track. My answer to his question was that territory up there is available for industrial development or for expansion of the Dixie Cotton Oil plant.

Q. He asked you if you regarded this as public or private track. I will ask you, Mr. Brooks, whether or not it is being built under the plan or system of private tracks or of a public track—that is with reference to who acquires the right-of-way, furnishes and builds it and pays for it.

A. It is being built as a common carrier's track. It is not intended to be used as a team track for the purpose of [fol. 54] placing cars at particular locations, but it is intended as a lead upon which to operate engines while serving industries which may be located on there and it will be open to the traffic to and from any industry that might be located thereon. In one sense of the word it is a public track, but that does not carry with it the usual understanding conveyed when you say a team track.

Q. But I say with reference to the financing of the track, is it being built in the way you build private industry tracks or public carrier tracks?

A. It is being built in the way that we construct other common carrier tracks. There is no industry participating so far in any portion of the track.

Q. The carrier is building it at its own expense?

A. Yes, sir.

By Mr. Kiskaddon: It is an extension or expansion of the Missouri Pacific Railroad system?

A. Yes, it is the usual facility to serve the public.

Q. And the freight received on it will be both inter- and intrastate?

A. I do not think we would make any difference if we had a consignee located thereon, which of course, we hope to do, we would not differentiate between intra- and interstate business.

Q. It is part of your transportation system, just as all of [fol. 55] your other lead tracks?

A. Yes, sir.

Q. And you would accept both intra- and interstate freight on it and deliver intra- and interstate freight on it?

A. Yes, sir.

By Mr. Wiley: That is all.

[fol. 56] Mr. H. R. Wilson, after first being duly sworn, testified as follows:

Direct examination.

Mr. Wiley:

Q. Your name is H. R. Wilson?

A. Yes, sir.

Q. What position have you with the Missouri Pacific Railroad?

A. General Freight Agent.

Q. How long have you been that?

A. About four years.

Q. Are you familiar with the track proposed, the crossing of which over the Cotton Belt spur is asked here, as described in Mr. May's exhibit No. 1?

A. Yes, sir.

Q. Are you familiar with the territory by actual observation of it?

A. Yes, sir.

Q. State whether or not you are familiar with the location and the traffic furnished by the Dixie Cotton Oil plant of the National Cottonseed Products Association, to be served by this track?

A. Yes, sir, I am familiar with the location of it and the traffic handled by it.

Q. What are the traffic necessities for this track?

A. Well, as far as the Dixie plant is concerned, in the [fol. 57] year 1929 the plant shipped out over the Missouri Pacific Railroad 553 cars and received inbound over the Missouri Pacific 502 cars—or a total of 1,055 cars. The inbound consisted principally of cottonseed, outbound consisted of meal, hulls, cottonseed meal and some linters. Of that traffic, that traffic I understand, from talking with Mr. Rice, President of the Dixie Mill, represented a little better than 60% of the total in and outbound business of the plant. All of it moving by the Missouri Pacific, under present arrangement, had to be handled by the Cotton Belt Railroad in switch movement and delivered to us through the interchange. We had to then go to our interchange and take the cars and take them in to the make-up yard and put them in our train. As a result of that, we were not able to give as quick service as we could give if we had access to the plant and performed the switching ourselves. There

would be some saving in time in getting those cars, the inbound cars, placed and the outbound cars forwarded, if *he was* access to the plant. The National Cottonseed Products Association has had up with us at least four years to my knowledge, the question of serving the plant, because of the very large volume of business that they did in connection with the Missouri Pacific. And I think it would expedite the business very materially if we had access on the switching of our own business directly to and from the [fol. 58] plant, and obviate the necessity of interchanging that business to the Cotton Belt.

Q. Does the Dixie plant wish the connection?

A. Yes, sir, the Dixie Cotton Oil Company, as I said, have had it up with us to my knowledge for at least four years. We worked out several plans, but did not make very much progress with it until along—well, let's see—I think it was about the first of March or perhaps a little earlier when the present negotiations with the Dixie Company started.

Q. 1930?

A. 1930—yes, however, as I say, they had previously for at least four years periodically asked us if there was not some way we could work out a better arrangement.

Q. Does the Missouri Pacific have arrangements to get in there?

A. We have a contract arrangement with the Cotton Belt Railroad for the use of certain portion of what is known as the old main line, whereby we serve certain industries in that same general territory, and as I recall it, our contractual right goes within aproximately 400 or 500' —I do not know the exact distance—but somewhere in the neighborhood of 400 or 500' of the Dixie plant.

Q. Tell the Commission whether or not you made an effort by negotiating chiefly with the Dixie plant owners to arrange with the Cotton Belt to reach that plant.

[fol. 59] A. Yes, the negotiations that we had were with Mr. E. Rice, President of the National Cottonseed Products Company.

Q. That is the owner of the Dixie plant?

A. That is the owner of the Dixie plant.

Q. Did that culminate in a conference last spring with reference to an effort to get an agreement with the Cotton Belt satisfactory to all concerned?

A. Yes, sir. Mr. Rice, under date of February 27, 1930, wrote to President Gorman of the Rock Island and President Upthegrove of the Cotton Belt, this letter. Do you want me to read this into the record or just explain it?

Q. If that is what originated the conference, I would like to know.

A. "The movement of cottonseed into our Dixie plant at Little Rock off the Missouri Pacific has increased to such an extent that we think it is necessary to make arrangements for that company to have use of the track serving our plant, in order to expedite the switching service. Our trackage contract with your company runs out on August 1, 1930 and this is to notify you of our desire for a conference to arrange for new trackage arrangements on use of tracks by the Missouri Pacific."

Q. Did that result in a conference among all concerned?

A. That resulted in conference between Mr. Rice, Mr. Rockenback of the Cotton Belt, Mr. Stewart, Industrial [fol. 60] Commissioner of the Rock Island, Mr. Brooks and myself. That conference was held in Memphis in Mr. Rice's office on April 30th, either 3rd or 30th, but my recollection is it was the 30th, 1930.

Q. Well, without going into details of the negotiations, tell the Commission whether or not you were able to come to an agreement with the Cotton Belt on any terms satisfactory to the going into the plant.

A. Well, Mr. Rice stated to the gentlemen the reasons he wanted the Missouri Pacific, and as a result of that statement, Mr. Stewart of the Rock Island said the Rock Island Railroad was perfectly willing for the Missouri Pacific to serve the plant, have joint use of such tracks as belonged to the Rock Island, into the plant. Mr. Rockenback, as I remember it, said there were some features about it he would not undertake to pass on himself and was a matter he would have to discuss with his management—also he advised us that they were not in position to allow us access to the plant except under certain terms and conditions which we felt were so unreasonable that we could not meet them.

Q. So you were unable to agree with them?

A. Yes, sir.

Q. Now, what was the result of your failure to agree there, with reference to the Dixie plant owners' attitude

and conduct with reference to that contract that they had with the Cotton Belt?

[fol. 61] A. Well, there is a contract existing between the Rock Island, Cotton Belt and Dixie Cotton Oil Mill involving the tracks owned by each of the three parties inside the plant enclosure. That contract is a continuing contract but may be canceled upon thirty days' notice prior to any annual anniversary of the contract. When we were not able to make satisfactory arrangements with the Cotton Belt for serving the plant, Mr. Rice served notice on the Cotton Belt of his intention to cancel contract on its anniversary, August 30, 1930, and said to us that would settle the matter so far as the Missouri Pacific's access to the plant's tracks were concerned. He told the Cotton Belt he would be very glad to see them continue in the plant, but as they had not bee- able to get together that he felt the Missouri Pacific was more necessary to him than the Cotton Belt—that if he had to choose between one or the other, he would have to take the Missouri Pacific.

Q. This track is—you do not undertake to know about the operating features of the crossing, do you?

A. No, I have not gone into that.

Q. Take the witness.

Cross-examination.

Mr. Dyer:

Q. What was the date of the letter Mr. Rice wrote in regard to the conference?

A. You mean the letter in which Mr. Rice asked for a conference?

Q. Yes.

[fol. 62] A. The first letter I have any record of, copy of which Mr. Rice sent to me, was letter addressed to Mr. Gorman and Mr. Upthegrove, dated February 27, 1930. That is the letter that I read. Copy of that letter was given to us.

Q. Did you have any conference with Mr. Rice in regard to that letter before it was written? Were you there when he wrote it?

A. No.

Q. Was it written at your instance? Did you ask him to write it?

A. No. The negotiations were opened in this way. Mr. Rice, as I say, and his predecessor in the company, had for a period of at least four years had up with us periodically the question of serving this plant. We up to this time had never found any feasible way of doing it, on account of the expense. It was physically possible, but the expense was so great we did not feel it would be justified. The situation changed, however, the early part of this year and remembering these previous requests of Mr. Rice that we make some arrangements to serve the plant, Mr. Brooks and myself went over to Memphis and met him in our room in the Peabody Hotel one evening after dinner and told him that we would, that we thought the situation had worked itself around to the point where we probably could work out some arrangements to serve his plant if he wanted us to. He said he would be very glad for us to—as he had wanted the Missouri Pacific in there for a long time—and [fol. 63] if there was anything he could do to bring that about, he was perfectly willing to do it. We took up with him the question of the ownership of the tracks in the plant and he furnished us with a copy of the 3-party contract. We went over that and discussed it some and Mr. Rice then suggested I am sure the suggestion came from him—that perhaps the best way to bring it up was to write the other two lines and ask for a conference. Said he would like to work it out between us harmoniously, that he had always felt kindly toward the Cotton Belt and did not want to do anything to harm them, but on the other hand he felt so much of his business necessarily moved over our line, it would be very advantageous to have us in there.

Q. As I Understand it, you looked him up and as a result of your conference with him, that letter was written, after you explained the situation to him, he said he liked the Cotton Belt service all right, but wanted the Missouri Pacific in there.

A. He said that long before we looked him up. He had been after us for three or four years, it came up periodically from the Dixie people, and as I say, we made some figures on it two or three times and it looked like the expense was so great we could not justify it, and it was only after some further development happened along the latter

[fol. 64] part of 1929 that changed the picture, that we felt like we were justified.

Q. Now, as a matter of fact, is it your main purpose in wanting to build this track in there to give prompter service or save the switching charge?

A. I did not get your question.

Q. Is it your purpose in building this proposed track to better serve the plant or save the switching charge you now pay the Cotton Belt?

A. It is both. We are anxious to give the public the very best service we can give them. If there is any way we can work that out and better our service, we are always ready to do it. Of course, we want to save all the money we can and necessarily operate the railroad as economically as we can.

By Mr. Kiskaddon: Mr. Wilson, I have heard you describe Mr. Rokenback's terms or proposition as unreasonable—now as a matter of fact, through Mr. Rokenback the Cotton Belt offered to authorize you to use 400' of its old main line and does give you access to this mill, as requested by you, and he conditioned that proposition upon a counter proposition that you permit the Cotton Belt to go into certain industries located in Pine Bluff, now exclusively served by you, so that would be an even swap. Was that not Mr. Rockenback's proposition that you turned down?

A. Well, I do not see anything very even about the swap.

[fol. 65] Q. In other words you proposed to go into an industry served not by you, but by the Cotton Belt at this point, but turned down the Cotton Belt's offer to let you in because they wanted the same privilege from you at Pine Bluff, is that correct?

A. No, that is not altogether correct.

Q. Isn't it true the Pine Bluff factories to which he was asking access had about one-fifth of the business of the Dixie plant?

A. As far as Pine Bluff situation is concerned, that is true.

Q. Mr. Wilson, did you testify that the Missouri Pacific absorbed the switching charges into the Dixie mills?

A. I did not.

Q. That is true, isn't it?

A. Yes, sir.

Q. On intrastate cars it is $3.36 a car?

A. No, it is $3.60, I think, unless it is in excess of a mile and half, as I recall it. It is either $3.60 or $4.05. I probably can look right here and tell.

Q. If you please. I understand you are right about the $3.60, but I do not want to commit you, though, unless you feel sure about it.

A. Yes, $3.60 is the present charge.

Q. Now, what is the switching charge that you absorb on the interstate cars?

A. $6.30.

[fol. 66] Q. Now, I believe you testified that for the calendar year 1929 the outbound cars the Missouri Pacific switched from this plant were 553 and that the inbound cars switched to this plant were 502.

A. That is according to my record.

Q. Assuming that your plan was approved by this Commission and finally put into force, what would the engine hire properly chargeable be there—that would be $10.00—would that not be $10.00 per hour for engine hire?

A. What do you mean, how much it would cost to perform the service ourselves, in lieu of paying the Cotton Belt?

Q. Yes.

A. I do not know—would not undertake to testify on that point. The question of switching costs are very intricate and you can only determine them by making a very careful test.

Q. I will ask you if $10.00 per engine hour is out of line?

A. I do not know whether it is or not.

Q. I will ask you if you have not charged that much on your road at other places.

A. I do not know whether we have or not.

Q. You do not mean to say you know nothing about engine hire on the Missouri Pacific?

A. I mean to say I have nothing to do with that. When an industry gets an engine from us they make arrangements with the Transportation Department.

[fol. 67] Q. And you have no personal knowledge?

A. No, sir, and prefer not to testify. I would be glad to tell you if I knew.

Q. That is all.

Redirect examination.

Mr. Wiley:

Q. Mr. Wilson, there is car hire as well as switching charge?

A. Yes, we allow an arbitrary reclaim four days at a time for each car switched, so in reality instead of paying the Cotton Belt $3.60 per car, we pay them on said business $3.60 plus $4.00 or $7.60.

By Mr. Kiskaddon: That is only on the assumption that it exceeds the time.

Q. No, we get arbitrary reclaim of four days on each car. There is just one thing that I wanted to answer Mr. Kiskaddon fully on and that is the question of negotiating with the Cotton Belt. Mr. Rockenback offered to let us into that plant, provided we let them into the Norton-Wheeler plant at Pine Bluff. That was one of his conditions, in lieu of allowing us the use of approximately 400' of his old main line to get to the Dixie plant. The question of the tracks within the plant enclosure was something he had no control over at all and subject to the industry, and any time that industry wanted another railroad in there it could easily [fol. 68] have it and necessarily could do it if they liked, so we did not feel that the Cotton Belt had very much to offer the Missouri Pacific in the way of getting into the plants. We felt like they did not have very much to offer in a trade.

By Chairman Harper: Are you through with the witness?

By Mr. Wiley: That is all.

By Chairman Harper: We will recess until 1:30.

1:30 p. m.

By Mr. Wiley: The petitioner rests.

[fol. 69] Mr. C. M. Wilson, after first being duly sworn, testified as follows:

Direct examination.

Mr. Dyer:

Q. Please state your name and connection with the Cotton Belt.

A. C. M. Wilson, Agent, North Little Rock.

Q. You are in charge of the station here at Little Rock?

A. Yes, sir.

Q. Are you familiar with the plant layout and situation at the Dixie Cotton Oil Mill plant?

A. Yes, sir.

Q. Does this map disclose the layout of the tracks at that point?

A. Yes, sir—it does.

Q. Please explain to the Commission what those different tracks are and the ownership of them.

A. The tracks shown in red are owned by the Cotton Belt and maintained by it at its expense. The tracks shown in green are owned also by the Cotton Belt and maintained by it at industry's expense. The tracks shown in mauve are owned by the industry and maintained by the Cotton Belt at industry's expense and tracks shown in yellow are owned by the Rock Island and maintained by it at the industry's expense.

Q. What are the present arrangements between the Cotton Belt and the industries and Rock Island as to switch-
[fol. 70] ing of the plant tracks, how is it switched?

A. As a rule, during the oil mill season, heavy season, the Cotton Belt——.

By Mr. Wiley: May I interrupt, please? This witness has testified about certain tracks in there and is proceeding now to testify about switching those tracks. It seems to me that the best evidence is the contract between the industry and the Cotton Belt, showing the conditions. This witness' conclusion as to who owns those tracks may not be a correct conclusion. I object to testimony he gave in his answer a while ago as to who owns those tracks, because the contract showing that ownership is the best evidence and I object to it and ask that it be stricken, unless they produce the contract, which we would like to have them do.

By Mr. Dyer: If the Commission please, we have no objection to producing the contract, but I do not ask anything about the contract. I ask who owned the tracks and that is not necessarily made by contract and if he knows who owns the tracks he can certainly state it.

By Chairman Harper: Do you know who owns those tracks?

A. Yes, sir. We have the contract.

By Mr. Wiley: Whether or not the industry is the owner is dependent upon that contract and this man's conclusion [fol. 71] may be entirely correct and may not be. May be the contract is open to some other construction and I believe we are entitled to have that contract and not have somebody's testimony here in accordance with certain contract industry owns a track and carrier maintains it at industry's expense. That involves too many conclusions.

By Mr. Kiskaddon: If it please the Commission, we will offer the contract. I do not want to clutter up this record but we are willing to put it in, but I think testimony should be allowed to stand, in view of the fact we are going to offer the contract and in view of another thing—the contract is not being attacked. It is purely a collateral matter, and I am going to ask the Commission to overrule that.

By Mr. Wiley: I have no objection to the testimony going in if they offer the contract. Witness has said he knows they own it because they have the contract. I suspend the objection until they produce the contract. I have no objection to the question and answer at all.

By Mr. Dyer: Is that a copy of the contract?

A. It is.

By Mr. Kiskaddon: I do not know that we are compelled to offer that in evidence, but we can submit it to Mr. Wiley or to the Commission.

By Mr. Wiley: I object to witness' conclusion as to ownership of those tracks in the absence of introducing contract.

[fol. 72] By Mr. Dyer: We are not claiming to own the tracks under the contract and are not offering the contract as evidence of title.

By Com'r Caudle: Let the contract be filed and proceed with the examination.

Mr. Dyer:

Q. Explain how the plant is being switched now.

A. The Cotton Belt switches the plant in the mornings and in the afternoons the Rock Island switches it.

Q. Is that true during the whole year?

A. Yes, sir.

Q. How are the Missouri Pacific cars switched to the plant?

A. Missouri Pacific deliver their cars to us in interchange and we switch them to the plant, deliver to the Dixie Cotton Oil Mill designated tracks, upon which they are loaded or unloaded, as the case may be.

Q. Where do you get the cars from the Missouri Pacific?

A. From the Missouri Pacific interchange.

Q. How far from the plant?

A. I would say about a mile.

Q. Do you handle them promptly to the plant, when you get them?

A. Yes, sir.

Q. How about delivering the cars from the plant to the Missouri Pacific?

A. They are handled in a like manner.

[fol. 73] Q. Is that handled promptly?

A. Yes, sir.

By Mr. Wiley: I want to make objection to that testimony as irrelevant. Why it has nothing to do with this crossing.

By Mr. Dyer: If the Commission please, they testified this morning the reason they wanted the track was the handling was not sufficiently expeditious or prompt at present.

By Chairman Harper: The Commission is going to overrule that objection.

By Mr. Wiley: Save our exceptions.

Mr. Dyer:

Q. What do you charge for switching cars in the case of cars moving intrastate and interstate?

A. In the case of cars moving intrastate, the switching charge is $3.60 per car. In the case of interstate shipments, the switching charge amounts to $6.30 per car. In the case of cross-town movements the charges vary—ranging from $3.60 to $8.05 per car, I believe it is.

Q. Are they the regular switching charges on file with this Commission and the Interstate Commerce Commission?

A. Yes, sir.

Q. Do you handle all the cars to the plant, the Cotton Belt and Missouri Pacific cars without discrimination, just

as received, one after another, handled in the order in which they are received?

A. Yes, sir.

[fol. 74] By Mr. Kiskaddon: That is if a Missouri Pacific car is received ahead of a Cotton Belt car, it is delivered ahead?

A. Yes, sir—no discrimination made as to the placing of Cotton Belt cars or Missouri Pacific cars.

Mr. Dyer:

Q. Have you made any investigation as to the number of Missouri Pacific cars handled by you from their junction to the plant and those from us during the first part of 1930?

A. Yes, I made an investigation a few days ago of that.

Q. Will you testify what your investigation in that respect disclosed as to the number of cars handled and the charges?

A. This was taken from the record in my office—reveals that there were a total of 660 cars handled for a period January first to August thirty-first, this year, to and from the Missouri Pacific for account of the Dixie Oil mill. That is both inbound and outbound.

Q. Well, what were the charges on it?

A. The charges vary. I did not check to see what proportion of the total cars handled were interstate or what proportion were state moved, but the majority of them were, safely stating, state moved on which the rate is $3.60 per car.

Q. Does the Cotton Belt have plenty of switch engines and yard crew down there to handle all the cars offered, both from its own road and from the Rock Island and Missouri Pacific?

A. Never been any complaint made of our service to that particular mill.

[fol. 75] Q. Would you say that the facilities and service of the Cotton Belt for switching the cars to that plant from the Missouri Pacific are adequate or inadequate?

A. I would say they are adequate, perfectly so. Never have been any complaints made by the oil mill as to our switching or handling Missouri Pacific cars or anybody's else- cars, to my knowledge there has not.

Q. Take the witness.

Cross-examination.

Mr. Wiley:

Q. This blue print of the tracks which you put in evidence does not show the spur which we are trying to cross, does it?

A. No, sir, it does not.

By Mr. Dyer: Pardon me. Let the stenographer mark the map as Exhibit No. A to defendant's testimony and the contract as Exhibit No. B.

Map and contract introduced in evidence as Exhibits A and B respectively—witness Wilson.

Mr. Wiley:

Q. That is all.

By Mr. Kiskaddon: If it please the Commission, Mr. Wilson is anxious to get away on his vacation. Can he be excused permanently?

By Chairman Harper: Yes.

[fol. 76] Mr. C. B. Pettigrew, after first being duly sworn, testified as follows:

Direct examination.

Mr. Dyer:

Q. State your name and official position.

A. C. B. Pettigrew, Division Superintendent, Northern Division, St. Louis Southwestern Railway.

Q. You have heard Mr. Wilson's testimony in regard to the ownership and location of the tracks serving the plant of the Dixie Cotton Oil Mill—do you agree with his testimony in that respect?

A. Yes, sir.

Q. Do you also agree with his testimony as to the manner in which the plant is switched?

A. Yes, sir.

Q. Do you know how long it has been switched just like it is now?

A. For the last eight years, that I know of.

A. What experience have you had as an operating man and railroad man?

A. Well, since March, 1919. From March 1919 until April 1920 I was train master on the M. K. & T., and from April 1920 until September 1923 Division Engineer on the Cotton Belt. And from September 1923 until the present time, Superintendent of the Northern Division.

Q. Are you thoroughly familiar with the North Little Rock yard of the Cotton Belt and its operation and the way [fol. 77] it is operated and equipment maintained over there?

A. Yes, sir.

Q. Would you say that the equipment and service is fully adequate for the proper service of the Dixie Cotton Oil plant, both as to Cotton Belt cars and Missouri Pacific cars and Rock Island cars, or that it is inadequate at present?

A. The facilities are adequate.

Q. That is all.

Mr. Kiskaddon:

Q. In your opinion as an expert railroad man, would the construction of this Missouri Pacific track into the mills constitute an unnecessary duplication of service?

A. It would.

Q. Can you give the Commission an idea of what would be approximately fair engine hire to be charged in case the application is granted and goes into effect?

A. At the present rate of wages and present cost of fuel and supplies, upkeep on power, the present cost of switch engine hire would be approximately $10.00 an hour.

A. Now, assuming such an engine would be used three hours per day for a week of seven days or twenty six days per month at that rate, together with the number of cars in and outbound which have been put in evidence, the cost of constructing and maintaining the spur as compared with [fol. 78] the switching charges, per car charges now absorbed by the Missouri Pacific, would it, in your opinion, save the Missouri Pacific any money or would it cost them more, if the application is granted?

A. In my opinion, very little expense, if any, would be saved.

Q. It would be about the same, that is your answer, as it is now?

A. Yes, sir.

Q. So that the proposal of the Missouri Pacific will not result in any financial economies so far as they are concerned, in your opinion?

A. That is my opinion.

Q. The whole result will be merely to put them into a mill which is now located on the Cotton Belt?

A. Yes, sir.

Q. You see no other advantages to accrue to them except that?

A. That is the way I see it at this time.

Q. And that in the face of your testimony that the mill is now adequately served by the two lines and by the switching arrangement now in effect—is that true?

A. Yes, sir.

Q. That is all.

By Mr. Wiley: We object to the line of testimony in this case. We do not care to cross-examine.

[fol. 79] By Mr. Kiskaddon: In answer to that objection, I will say it is rebuttal testimony to which they have offered to the effect it will result in economy and better service and we say it will not result in economy and is now adequate. It is rebuttal.

Mr. Wiley:

Q. Mr. Pettigrew, if your proposition there is correct, why does the Cotton Belt want to keep us out, if they are not making any money on that switching?

By Mr. Kiskaddon: I object to that. We did not testify we are not making money.

By Mr. Wiley: That is the result of his testimony—that he can do the switching he is doing cheaper than—I mean if he cannot do the switching he is doing cheaper than he can hire somebody else to do it, why does he want to keep the Missouri Pacific out. You do not mean you expect the Missouri Pacific to take any more freight than it is getting out of the mill now?

By Mr. Dyer: I did not understand Mr. Kiskaddon's question to infer that.

By Mr. Wiley: That is all.

Mr. Dyer:

Q. Mr. Pettigrew, as I understand your position—we will lose revenue from the switching and the Missouri Pacific will gain nothing. Is that correct?

A. That is correct, yes, sir.

Mr. Wiley:

Q. Well, Mr. Pettigrew, on that theory, if the Missouri [fol. 80] Pacific does the switching, you will not have to do the service and you will save that service and all the rest of the cost of the switching?

A. No, sir. We have to switch the mill anyway.

Com'r Caudle:

Q. Which one of these railroads was in the cotton oil mill first—the Rock Island or Cotton Belt.

A. I do not know.

By Mr. Kiskaddon: I think we can put a witness on who will answer the Commissioner's question.

By Chairman Harper: Any further questions?

By Mr. Dyer: That is all.

By Mr. Wiley: That is all.

[fol. 81] Mr. R. P. Harrington, after first being duly sworn, testified as follows:

Direct examination.

Mr. Dyer:

Q. Mr. Harrington, what is your official position with the Cotton Belt Railroad?

A. Traffic Manager in charge of solicitation.

Q. How long have you been in the Traffic Department of the St. Louis Southwestern Railway?

A. About five years exclusively.

Q. Did you ever live here in Little Rock?

A. Yes, sir.

Q. Are you familiar with the situation over there in North Little Rock?

A. Fairly so.

Q. As regards the tracks, etc.?

A. I have not been over there lately. I used to be—have not noticed the trackage in a long time.

Q. You have heard the testimony of Mr. Wilson and Mr. Pettigrew in regard to the physical layout of the tracks serving the Dixie Cotton Oil Mill—do you agree with them?

A. Looking at the blue print and as explained under the heading of the legend, I do.

Q. You have also heard their testimony to the fact that the present arrangement in regard to switching service and equipment of the Cotton Belt is fully adequate. Do you [fol. 82] also agree with that?

A. I do.

Q. Have you ever received any complaints from the mill in regard to that switching?

A. When I was Assistant General Freight Agent at Little Rock, I received one complaint one morning of the slow movement of three cars by the Cotton Belt from the Dixie Cotton Oil Mill to the connection, and I made a personal investigation that morning by going to the mill and the young man who filed the complaint by telephone with me, I do not recall his name at the present time, handled it with the Missouri Pacific in my presence over the telephone, and they found that instead of the cars being delayed by us that they did not have a train to handle the cars to the destination—it was cotton seed hulls going to some point on their line—they did not have a train to handle on, on account of being a short distance out of Little Rock, and they acknowledged the responsibility and that was the only complaint I had during practically the two years I was here.

Q. And that was in regard to one particular movement?

A. Yes, that is the only one I ever had.

Q. Now, if this application is granted, will the Cotton Belt lose any revenue?

A. That depends entirely upon the destination of the traffic and the manner in which it is routed.

[fol. 83] Q. It will lose revenue from switching Missouri Pacific cars?

A. Yes, sir, it will.

Q. Of course, the expense of maintaining the tracks, equipment and switching the plant will be substantially the same that it is now?

A. Yes, sir.

Q. So that the loss in the switching revenue will be pretty much a clear loss?

A. It will as far as interchange between our line and the Missouri Pacific is concerned, for account of the Dixie mill.

Q. And the investment in facilities serving the Dixie Mill for the railroads here as an aggregate will be increased in the sum it costs the Missouri Pacific to build the proposed track?

A. I think so.

Q. You heard the testimony this morning in regard to how it is proposed to build that track and where it will run —as shown on this map here. Now, then, the testimony shows that this track will begin up here somewhere at the Missouri Pacific main line and run down substantially 4000' southward and then turn to the east across the track by which the Cotton Belt serves the Arkansas Power and Light, and parallel the Cotton Belt old main line several hundred feet to the Dixie plant. Now then, I will ask you if there is other property besides the Disie plant in this vicinity [fol. 84] that could also be served by this track?

A. Well, the witness stated there this morning that they proposed serving the Arkansas Power and Light industry there on the opposite side and then they have the Rose City that they do not get into at the present time.

Q. Now, is the property to the north, is that also substantially adjacent to the Cotton Belt main line and in position to be served by it?

A. Yes, sir.

Q. Is it a territory that the Missouri Pacific is not equipped with its present facilities to serve?

A. No.

Q. They are not?

A. No.

Q. Would the construction of this new track paralleling them to the north with the Cotton Belt have a tendency to obstruct the Cotton Belt from getting into this territory that lies adjacent to its line?

A. I think so.

Q. Would it be possible to extend this proposed track if the Missouri Pacific desired to do so across the Missouri Pacific and up east?

A. Yes, sir.

Q. They could construct across the Cotton Belt and to the Missouri Pacific and across that way?

A. Yes, sir.

[fol. 85] Is that property in there in position to be served by the Cotton Belt?

A. It is.

Q. Would you say it is in the Cotton Belt territory?

A. Yes.

Q. The Cotton Belt has a line over there at present?

A. Yes.

Q. Take the witness.

Cross-examination.

Mr. Wiley:

Q. Mr. Harrington, I read you this provision from this contract: "Unless sooner terminated, as it may be at the option of the railways upon breach by the industry of any of its covenants herein or should industry fail to give the railroad sufficient business to warrant continuation of this agreement, the term of this agreement shall be for a term of one year from the date hereof, and thereafter from year to year until either party shall see fit to give notice in writing to the other thirty days prior to the expiration of any yearly term, of its intention not to renew the same." Don't you consider a notice by an industry to the Cotton Belt to cancel that was a pretty considerable complaint?

By Mr. Kiskaddon: If it please the Commission, he is calling for a construction of the contract and that is either an [fol. 86] attorney's job, if he is qualified as an expert, which Mr. Harrington is not qualified, or the Commission's job.

By Mr. Wiley: They asked if they had made any complaint and I am asking whether he does not consider notice of cancellation a complaint.

A. From a legal standpoint, I am not able to say. The complaint I spoke of was with reference to service.

Mr. Wiley:

Q. Don't you consider notice of cancellation of that contract is a complaint as to the service?

A. I would say not. We have lots of notices to cancel contract, where use of the track is no longer required or for various reasons, and while I have not seen the notice to cancel I do not know what the notice said—whether it complains of service or what it might complain of.

Q. You know, don't you, that it was not made because the usage of the track was no longer necessary?

By Mr. Kiskaddon: If it please the Commission, I must object to that line of questioning—that has really gone far enough. There is no evidence such a notice was served, but if served, I think it is the function of the Commission to ascertain where the "nigger in the wood-pile is" and why such a notice is served. They are perfectly qualified [fol. 87] to understand it and I object to that line of questioning.

By Chairman Harper: I am going to sustain that objection. You may get some witness to answer that question, if you have them.

By Mr. Wiley: That is all.

[fol. 88] Mr. C. C. Rockenback, after first being duly sworn, testified as follows:

Direct examination.

Mr. Dyer:

Q. Mr. Rockenback, what is your personal connection with the St. Louis Southwestern Railway?

A. Industrial Commissioner.

Q. You have been Industrial Commissioner for about ten years?

A. Yes.

Q. Are you familiar with the general situation both as to the physical tracks and as to the service at the plant of the Dixie Cotton Oil Company?

A. I am familiar with the trackage layout, yes.

Q. Do you agree with the testimony of Mr. Wilson and Mr. Pettigrew in that respect?

A. Yes.

Q. Do you have anything further that you would like to add to it in regard either to the physical conditions over there, the tracks, or the service that is given?

A. No, sir.

Q. Are you familiar with the proposal of the Missouri Pacific to build a track of their own into that plant?

A. Yes, sir.

Q. Will the building of that track and service over it by the Missouri Pacific have the effect of depriving the Cotton [fol. 89] Belt of the switching revenue that it is getting under the present arrangement?

A. Yes, sir.

Q. In order to deprive the Cotton Belt of that revenue will it be necessary for the Missouri Pacific to make a substantial investment and duplicate facilities already owned and used by the Cotton Belt?

A. Yes, sir.

Q. And over which they are not getting service?

A. Yes.

Q. Can you testify as to the expense that they will be out in building that track?

A. I can give approximate figures as to trackage, without right-of-way. The track is in excess of a mile and I estimate it to cost not less than $25,000 upward.

Q. Do you think that they could save enough on the switching to pay the interest on that investment?

A. Well, I am not qualified to answer that question, because I do not know what it costs to do the switching to that plant.

Q. Do you know for what distance it is proposed the track will parallel the old line, main line, of the Cotton Belt?

A. I only noticed on the print. It was testified this morning that it would be something between 600 and 700′, and I was under the impression it was farther than that. [fol. 90] This is 1″ to 100′. I judge from 600 to 800′, maybe more. I could scale it on the print and give it to you definitely.

Q. What sort of property is the property to the north of the track and the Cotton Belt main line?

A. It is property that is available for industrial locations.

Q. Is it located adjacent to the Cotton Belt right-of-way and tracks and in such position that *that* it can be very easily served by the Cotton Belt, from the Cotton Belt?

A. Yes.

Q. Is it out of the province of the Missouri Pacific tracks as now located?

A. It is, yes, sir. The Missouri Pacific is a greater distance than our line, naturally we can serve it more easily than the Missouri Pacific.

Q. That is, it is right on our line, and the Missouri Pacific is substantially a mile from it?

A. Yes.

Q. Then would you consider as to this property over here, the effective property, which has the potential industrial use, would you consider this track as to that property, is an invasion of the Cotton Belt property?

A. Yes, and also the one in which they propose to so construct, with a view of keeping us out of that territory, because it parallels and is immediately adjacent to our right-of-way.

[fol. 91] Q. That is, if we wanted to get across to that territory which is properly our territory, we would have to build across the Missouri Pacific track that is built right adjacent to us?

A. Yes, sir.

Q. What do you think of the possibility of this proposed track if built by carrying it across the Rock Island and fa-ther east?

A. They can itilize the tracks of the Dixie and cross the Rock Island and continue on in an easterly direction.

Q. How about getting across the Cotton Belt into the south and southeast?

A. By crossing our old main line and the right-of-way.

Q. Is that property to the southeast served by the Cotton Belt?

A. Yes, sir.

By Mr. Kiskaddon: All of that property you have referred to in your testimony is capable of industrial development?

A. Yes, sir.

Q. As Industrial Commissioner of the carrier would you say it is likely to become industrially developed?

A. Yes, sir.

Q. Would you say if fully industrially developed, the facilities in there now would be able to take care of it in its improved condition?

A. Yes, sir.

Q. Without the addition of a third carrier?

[fol. 92] A. Yes, sir.

Q. Now, Mr. Rockenback, there was some testimony where you made a proposition to the Missouri Pacific to let them in to the Dixie Oil Mill by offering them the use of 400′ of our old line—did you make such a proposition?

A. Yes, sir.

Q. Was that proposition contingent upon the Missouri Pacific doing us the same favor into one of the industries located on their line in Pine Bluff?

A. Yes, sir.

Q. You proposed with one hand to wash the other?

A. Yes, sir.

By Mr. Wiley: Pardon me—I object to those two questions and answers. The proposition is the best evidence. It is in writing.

By Mr. Kiskaddon: We will offer the writing.

By Mr. Wiley: That is all right.

By Mr. Kiskaddon: Read the proposition, Mr. Rockenback.

Mr. Rockenback:

A. It is a letter addressed to Mr. J. Cannon, Vice Presi-[fol. 93] dent of the Missouri Pacific at St. Louis, under date of June 8, 1930: "Replying to your letter of May 28th, file JC-33296, wish to advise that this company takes the position that the Missouri Pacific Railway Company, if it has any rights at all—they first intended to break out this proposed track out of the tracks of the Argenta Terminal Company on which there is a contract still in existence between the Cotton Belt and Argenta Terminal Company, which prohibits the Argenta Terminal breaking out of that contract to serve any industries that are served by Cotton Belt industries, therefore, this has reference to

that, I suppose however—the thing will become clear when I read the whole letter—wish to advise that this company takes the position that the Missouri Pacific Railway Company, if it has any rights at all to use the Argenta Terminal Railway, is bound by the terms of the agreement between the last named company and this company, dated April 20, 1916. This company is unwilling to waive any provisions of the last mentioned agreement and particularly those which prohibit the construction of any tracks or railroad for the purpose of serving any plant industry or business now served by this company.

By Mr. Kiskaddon: Pardon the interruption—when you reach the end of the part of the letter which refers to that, will you indicate that, so the Commission will know [fol. 94] the pertinent part of the letter, when you reach it?

By Mr. Wiley: I suggest he read the letter and then make explanations. It is confusing.

By Mr. Kiskaddon: That is true.

Mr. Rockenback:

A. The next two paragraphs interlink, so I will have to explain—"This company is agreeable to permitting the Missouri Pacific to use, under the terms of the contract between our companies dated the 24th of September, 1925, 400′ additional of its old main line or sufficient to enable your company to reach with our connection serving the Dixie Cotton Oil Company, and to also grant you under the terms of the same contract the right to use the track of the industry owned by this company, upon the following conditions: That this company's rights under contract with your company, dated, April 30, 1926, covering the use of your main line at Pine Bluff, Arkansas, in connection with track serving the Seeman-Dunning Corporation be extended westwardly a distance of approximately 1000′ to a point opposite the center of block 17 of Monk's Northwestern Addition to Pine Bluff, with the right upon the part of this Company to have your company construct and thereafter maintain at this company's expense a connection with [fol. 95] the track serving the Norton-Wheeler Stave Company, alternatively, if you are willing to construct such additional track, that our trackage under the said contract be extended westwardly a distance of 400′ west of the

head block of the plant track now serving the Norton-Wheeler Stave Company." That is the end.

By Mr. Kiskaddon: Is that all of the letter?

A. Yes, that is the end.

Q. Who wrote that letter?

A. I did.

Q. You communicated that proposition to the Missouri Pacific?

A. Yes, sir.

Q. And they turned it down?

A. Yes.

Q. I will ask you, what is the amount of freight originated by the Norton-Wheeler Plant at Pine Bluff, which we propose to get into, and the amount of freight produced by the Dixie Cotton Oil plant, which the Missouri Pacific is proposing to get into—how do they compare?

A. The Norton-Wheeler Stave Company handles approximately all told 200 to 225 cars a year, both inbound and outbound.

Q. What would you say about the freight originated by the Dixie Cotton Oil Mill?

[fol. 96] A. I think our records show that we switched for account of the Missouri Pacific some 1100 odd cars, and the Cotton Belt handled some less than that amount. I do not exactly recollect the figures, possibly 600, but I cannot say; the Rock Island is also in the Dixie and I did not know how many cars the Rock Island handled out of the Dixie plant.

Q. So our proposition to get into a plant served by them in exchange for this arrangement was a proposition to get in a plant that gave less freight than the Dixie Cotton Oil mill plant?

A. Yes.

Q. One more question—is that proposition still open to the Missouri Pacific?

A. Yes.

Q. That is all.

Cross-examination.

Mr. Wiley:

Q. Now, Mr. Rockenback, you state the Missouri Pacific turned that down?

By Mr. Kiskaddon: I object to that question and answer, unless the witness shows the letter whereby they turned it down, if he construed it so.

By Mr. Wiley: You have the letter from Mr. J. Cannon in answer to that?

[fol. 97] By Mr. Kiskaddon: Read the letter and make explanations.

By Mr. Wiley: Yes, here it is.

A. June 12, 1930.

By Mr. Wiley: Four days after this was written, isn't it?

A. Yes. I want to correct the record before I go into this and make an addition to my letter addressed to Mr. Cannon on the 8th, as follows: This is dated June 9th, addressed to Mr. J. Cannon; "In the last paragraph of my letter of June 8th, the following sentence was omitted: "In either of these cases we will also be given the right to use the tracks serving the plant of the Norton-Wheeler Stave Company." That is an omission by the stenographer on this letter.

Mr. Cannon's reply to me, under date of June 12th:

"Referring to your letters of June 8th and 9th, file G-284-32 and G-284-36A, as previously advised, we do not recognize your contract of date April 20, 1916, with the old Argenta Terminal Railroad Company, as being in any way binding on the Missouri Pacific Railway Company and therefore, we cannot favorably consider the proposition submitted in your letter of June 8th as an arrangement under which our company would grant additional trackage rights on your switch lead to reach and serve the Dixie [fol. 98] plant of the National Cottonseed Company at North Little Rock. The reciprocal arrangement at Pine Bluff, under contract of date April 30, 1926, pertaining to each of our company's serving the Seeman-Dunning Corporation does not, as you seem to understand, give your company any rights on our main line. "I do not feel warranted in either granting your company switching rights on our main line at Pine Bluff to reach and serve the Norton-Wheeler plant or construct a special switch track for your use to reach and serve the Norton-Wheeler plant.

"I would, however, be willing to work out a reciprocal arrangement under which the agreement of April 26, 1906

(under which we enjoy the use of your old main line now and switching lead to a point approximately 400′ of the Dixie plant of the National Cottonseed Company) would be enjoyed, placing in one pool the respective trackage of each now served by that agreement and that portion of the Old Argenta Terminal south of your connection therewith, and your switching lead to Nero Junction with the right in each to serve any and all industries now or hereafter existing and reached and served through the respective tracks of each, as above defined. Under such an arrangement, I think it would be proper that all contracts of each, as now existing, be put in at their present fair value, as determined by our Chief Engineers and interest rental computed at [fol. 99] 6% per annum thereon, as increased from time to time account improvements and additions, taxes, maintenance and incidental operating expenses applicable thereto to be apportioned between all railroads having the right of use of all or any portion thereof, on a numeral basis, this numeral basis is suggested to simpl-y the accounting that would be involved under such arrangement and for the necessity of having zone facilities and keep a record of the use of various sections thereof.

"At present the Rock Island is enjoying the use of that part of the Old Argenta Terminal that would be brought under this arrangement and there would, for the time being be three users thereof. I understand your and the Rock Island tracks serving the old Dixie Cotton Oil mill plant are pooled with the Missouri Pacific serving that plant—under such an arrangement, there would be three users of your portion of tracks serving the old Dixie plant.

"A contract of this nature should be more or less permanent and if entered into, in my opinion, should be for a period of not less than fifty years. Under such contract each road, of course, would reserve the right to admit other tenants to use of its part of the facilities, but neither road should have any right to admit a tenant to use the use of the other road's part of the facilities.

[fol. 100] "As advised you by Mr. Witt in conference, we must proceed without delay with our entrance into the old Dixie plant, now a plant of the National Cottonseed Products Corporation, and if any arrangement along the above lines is to be consummated, the negotiations will have to be completed without delay.

"If some such arrangement cannot be worked, we will have to deny your company any use of the Argenta Terminal tracks on and after May 13, 1931."

That is the end, signed by J. Cannon, Vice President-General Manager.

By Mr. Wiley: That is addressed to you?

A. Yes.

Mr. Wiley:

Q. Then it appears it is true that formerly upon receipt of your letter he explained to you why he could not consider favorably your proposition and made you a counter-proposition, didn't he?

A. Yes.

Q. And that letter remains unanswered by you, to this date, does it not, Mr. Rockenback?

A. Yes.

By Mr. Kiskaddon: Did you decline that verbally?

By Mr. Wiley: Wait a minute. Let me get through with the witness, please.

[fol. 101] By Mr. Kiskaddon: Pardon me.

By Mr. Wiley: Mention has been made of the Cotton Belt old main line. That is used now merely as a switch?

A. It is used as a main lead industrial track.

Q. There is now another main line of the Cotton Belt, which is used as a main line, and this old main line is merely an industrial lead or a lead track for switching purposes?

A. Yes.

Q. That is all.

By Mr. Kiskaddon: That is all.

[fol. 102] Mr. A. H. Merck, after first being duly sworn, testified as follows:

Direct examination.

Mr. Dyer:

Q. Please give the stenographer your name and official position with the St. Louis Southwestern Railway. A. Assistant General Freight Agent, Little Rock.

By Mr. Kiskaddon: Pardon me a moment. I promised the Commission Mr. Rockenback would answer the question as to who, if any, of the lines was in the Dixie mill first. We excused Mr. Rockenback without answering that and he is prepared to answer any questions the Commission may ask now, with reference to it.

[fol. 103] Mr. C. C. Rockenback (recalled).

Com'r Caudle:

Q. Who was in the cotton mill first, the Rock Island or Cotton Belt?

A. As far as my records I have with me and my knowledge, the tracks have been in the present plant in excess of 15 years and I believe at the time the original plant was constructed, other than the Dixie people, both the Cotton Belt and Rock Island constructed tracks at the same time.

By Mr. Wiley: May I ask one question on that line?
By Mr. Kiskaddon: Certainly.

Mr. Wiley:

Q. Then this contract, Mr. Rockenback, that was put in evidence in your Mr. Wilson's testimony, which seems to bear date of August 30, 1929 is merely a renewal of former contract?

A. Yes, that contract placed in evidence as an exhibit shows in the last paragraph contracts which it canceled and superseded and dates thereof.

Q. And this is a renewal?

A. Yes.

Q. That is all.

* * * * * * *

[fol. 104] Mr. A. H. Merck (continued).

Mr. Dyer:

Q. How long, Mr. Merck, have you been in the Traffic Department of the St. Louis Southwestern Railway?

A. Nineteen and one-half years.

Q. How long have you lived in Little Rock?

A. Since 1911.

Q. Are you familiar with the physical aspect of the tracks at the Dixie Cotton Oil Mill plant?

A. In a way, yes, sir.

Q. Are you familiar with the arrangements that are in force over there as to switching?

A. Yes, sir.

Q. And are you familiar with the manner in which the Cotton Belt handles and switches the cars between the Missouri Pacific and the Dixie Cotton mill?

A. Yes, sir.

Q. Do you agree with the testimony of Mr. Wilson and Mr. Pettigrew as to how those matters are handled and as to physical layout of the plant?

A. I do.

Q. In your opinion, is the service given by the Cotton Belt in the handling of the Missouri Pacific cars adequate or inadequate?

A. I would say it is adequate.

Q. Are they promptly handled?

[fol. 105] A. Yes, sir.

Q. Do we have plenty of equipment and men over there to handle them?

A. Yes, sir—we have had no complaint.

Q. Are they handled just as Cotton Belt cars, without any discrimination in the manner of handling?

A. Yes, sir.

Q. Would the construction of this proposed track by the Missouri Pacific be a mere duplication of the tracks the Cotton Belt already has?

A. I would say so, yes, sir.

Q. And perform the same service that is now being adequately performed, as you say, by the Cotton Belt?

A. Yes, sir.

Q. Is there anything further that you can add that would give the Commission any help in the matter, if there is, I would like to have it.

A. No, sir—I have no further information.

Q. That is all.

By Mr. Wiley: No questions.

By Mr. Dyer: If the Commission will pardon me a minute, I think we are through. We close, your Honors.

[fol. 106] By Mr. Wiley: May we have a few minutes to confer?

By Chairman Harper: Yes, we will recess for 10 minutes.

* * * * * * *

By Mr. Wiley: I would like to recall Mr. H. R. Wilson.

[fol. 107] Mr. H. R. Wilson (recalled).

Mr. Wiley:

Q. Mr. Wilson, you have heard testimony on the respondent's part as to the adequacy of their service. While we are not here especially attacking their service and do not believe that is relevant, I do not like to remain silent, and I will ask you if you know of any particular benefit to shippers which would accrue by the use of the track proposed by the petitioner, over the present arrangement.

A. Yes, the majority of the business moving via the Missouri Pacific would be expedited 24 hours, for this reason. The mills in that territory in the busy season will be, some of them, as late as 7, 8 and 9 o'clock at night. While we have an arrangement whereby we serve down in this same kind of territory that when a car is loaded as late as 5 p. m. it is pulled out and put into our make-up yard and forwarded on our short load extras. Those trains go out anywhere from 9 to 11 o'clock at night and by getting the car—for instance, a car going to Conway or Morrilton—that is the only train we have to handle that stuff. Now, if we do not get that car into our yard in time to make that short load extra that night, it stays until the next night, 24 hours, and it is a physical impossibility to make that service where [fol. 108] you have to take the business through interchange. I do not say the Cotton Belt are not giving good switching service there, but the delay incident to their going after the car, taking it and putting it on their interchange, and then it takes us just as long to take it off the interchange and put in our train as it does to take directly out of the mill and put in our train, so it is impossible to get those cars on our short load extra, where loaded late in the afternoon, for that reason. And a 24-hour delay would be expedited, if we served them.

By Commissioner Henderson: Would it be possible for the Commission to get the Dixie people over here as witnesses in this case?

By Mr. Wiley: It might be.

By Com'r Henderson: I think they would be the ones to know whether or not the service is satisfactory. And would not this same condition prevail, only in the reverse, if you are the only line that serves the Temple Cotton Oil mill? Would that same condition prevail as you claim prevails at the Dixie mill?

Mr. Wilson:

A. I do not think so, because as I recall it, the Cotton Belt's train gets out of here I think about 9 o'clock p. m. I do not know whether we are making movement from the [fol. 109] Temple on carloads as late at 5 P. M. or not, to make connection with that Cotton Belt train. I am unable to answer.

Mr. Wiley:

Q. Mr. Wilson, you heard the letter which Mr. Rockenback read which he wrote Mr. Cannon, June 8 and 9, 1930, where he is claiming credit for making a proposition which was reasonable. I wish you would just explain to the Commission why and how that is unreasonable as you so designated it in your direct-examination.

By Mr. Kiskaddon: If it please the Commission, when we attempted that explanation, counsel objected on the grounds the letters were the best evidence and we introduced them.

By Mr. Wiley: I objected to the fact that they made their explanation as they went along. The witness interrupted himself to explain the letters.

By Mr. Kiskaddon: The only explanation made about the letters was that some party did not apply. That is all. In response to that objection—and I think it was well taken—we introduced the letters. I think the Commission is entitled to the letters and not opinions, and I make the same objection.

[fol. 110] By Com'r Caudle: What is the question you asked?

By Mr. Wiley: I will restate it.

Mr. Wiley:

Q. What are the facts in the letter and proposition made in the letter *of* Mr. Rockenback wrote Mr. Cannon there, to which the Missouri Pacific objected as unreasonable and why did they object?

By Mr. Kiskaddon: I object to that on the ground that the letters are in evidence and speak for themselves.

By Com'r Caudle: I think I can well answer that question. We have heard the letters read.

By Mr. Kiskaddon: I withdraw my objection.

Mr. Wilson:

A. The proposition made by Mr. Rockenback was that he would allow us to use 400′ of his main line to reach the connection with the Dixie plant, his old main line, provided first that we would recognize a contract which he has in his possession executed by the old Argenta Terminal Railroad Company, before the Missouri Pacific purchased it, under which the Cotton Belt is given perpetual rights for the use of that line, and second it is prohibited from building any [fol. 111] spurs to serve any industries paralleling a certain portion of the road.

Mr. Wiley:

Q. Who is prohibited?

A. Missouri Pacific. Now, when we purchased the Argenta Terminal Railroad, we purchased the physical properties of the railroad. A contract was presented to us as existing between the Argenta Terminal Railroad and the Cotton Belt, under which the Cotton Belt was given the right to use the road, I think until some time in May, 1931. That was a contract that was represented to us by the owners of the Argenta Terminal Railroad as being the contract in existence. We had a deed to the property, subject to the contract, and the contract was recorded with the deed. The first knowledge we ever had that there was any claim there was a previous contract in existence was this letter from Mr. Rockenback. If we had agreed to that, it would have meant we would have to give up 50% use of a railroad we

paid a great deal of money upon and on which we have no rights beyond 1931.

By Mr. Kiskaddon: That is a dispute between the Cotton Belt and Missouri Pacific with reference to whether a contract the predecessor company of the Missouri Pacific made is in force, whether the contract went with the Argenta Terminal Railway to the Missouri Pacific when the transfer was made. The Missouri Pacific is claiming they bought the [fol. 112] property, but not the contract. We are claiming the contract binds them. That is a legal question and any question with reference to that is absolutely improper.

By Com'r Caudle: Was the contract of record at the time the Argenta Terminal Railroad was bought?

By Mr. Kiskaddon: No*t*, it was not a record, but it was in existence and is being lived up to. That is a legal question. The court has to pass on that and this shows the impropriety of this kind of testimony, when you have the letters.

By Mr. Wiley: I am sure counsel does not want to conceal the dispute. That dispute is one of the reasons the witness is now giving for refusing and saying that is absolutely unreasonable when they ask them to concede the right of that dispute was with the Cotton Belt. That is a dispute between us and is the very basis the witness is giving for that being unreasonable.

By Com'r Caudle: I believe you fellows are not getting anywhere. Let this fellow keep talking—maybe he will find it.

Mr. Wilson:

A. That is one of the objections we had in accepting the [fol. 113] proposition, because it attempted to settle this dispute. In other words, as we understood his proposition, it demanded whatever legal right we may have to contest this contract would have to be waived aside as a part of this trade. That was one objection.

By Com'r Caudle: The contract you are talking about—your contract expires in 1931?

Mr. Wilson:

A. The contract we inherited and the only one we knew existed at the time we bought the railroad does not expire in 1931.

By Com'r Caudle: The contract you are talking about—when does it expire?

By Mr. Kiskaddon: It is perpetual.

By Com'r Caudle: Inasmuch as this condition is this lead breaks out from the main line and not from the Argenta Terminal Railroad track, I do not see that we can go any farther with the question of the contracts.

By Mr. Wiley: It is just on the reasonableness of the proposition—whether we are in the wrong, as they are trying to put us by not accepting their proposition. The witness was explaining they did not accept because they [fol. 114] were requiring us as a condition of accepting it to absolutely concede their position.

By Com'r Caudle: I think the Commission will take the view of it that you attempted to make a trade and did not make it.

By Mr. Kiskaddon: Mr. Rockenback testified the Argenta proposition is out, and that contract does not concern us. The proposition now open is we will give rights over 400′ into the Dixie mill if they will give us right over some tracks into the Norton-Wheeler Stave Company at Pine Bluff. That is all that is open. That proposition is open right now.

By Chairman Harper: Any more testimony.

Mr. Wiley:

Q. You were going to explain the other reason, Mr. Wilson.

Mr. Wilson:

A. The second reason was it involved the use of 1000′ of our main line in territory that is developing industrially, in exchange for the use of 400′ of their old main line.

By Chairman Harper: That was your main line where?

Mr. Wilson:

A. At Pine Bluff. It involved the use of a thousand feet [fol. 115] of our main line at Pine Bluff in turn for using 400′ of the Cotton Belt's old main line, which is nothing more than a switch lead.

By Com'r Henderson: What would be the difference in the amount of revenue between the plants located on the two lines?

Mr. Wilson:

A. As far as Norton Wheeler is concerned right now, it is not of much importance, but it opens up territory which probably will be of considerable importance.

By Com'r Henderson: Is there any possibility of opening up territory on this 400' of Cotton Belt line?

Mr. Wilson:

A. I do not think so. We serve every industry in there now except the Dixie. There is nothing else.

By Mr. Wiley: That is all.

By Com'r Henderson: Is that main line in Pine Bluff the old P. B. & W. main line?

A. Yes, main line to Benton.

Q. How many trains run a day on that?

A. I think a couple.

By Mr. Kiskaddon: Isn't it a fact you operate one mixed train per day each way?

[fol. 116] A. I guess that is about right.

Mr. Wiley:

Q. Mr. Wilson, you know, don't you, that there are some log trains of the Long Bell Lumber Company that use that at irregular intervals?

A. Yes, they have a trackage contract. I do not know how many trains they run, but they do run over it.

By Mr. Kiskaddon: We have no more questions.

By Chairman Harper: Is the Long Bell Lumber Company using that now?

Mr. Wilson:

A. Yes, sir.

By Mr. Wiley: That is all.

By Mr. Dyer: That is all. We are through.

By Chairman Harper: The Commission is going to take this under advisement. We want to make an investigation of it—I think I want to go out and see that.

* * * * * * *

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

[fol. 117] DEFENDANT'S EXHIBIT NO. "B"

The Chicago, Rock Island and Pacific Railway Company and St. Louis Southwestern Railway Company

Industry Track Agreement

This agreement, made this 30th day of August, 1929, between St. Louis Southwestern Railway Company, first party; The Chicago, Rock Island and Pacific Railway Company, second party (first and second parties hereinafter jointly called "Railways") and National Cottonseed Products Corporation, incorporated under the laws of the State of Delaware (operating the Dixie Cotton Oil Mill), third party (herein called "Industry"), Witnesseth:

1. In consideration of Industry's covenants, Railways severally covenant that they respectively will:

1.1. Serve Industry's premises at North Little Rock, Arkansas, by means of Industrial Tracks 4,559.5 feet in length, consisting of five tracks 924.2, 1,155.6, 1,015.2, 513, 771.6 and scale track 180 feet in length, herein called "said tracks", as described on plat of same on file in Industrial Track Plat Record in the office of the first party's Chief Engineer, a copy of which is attached hereto, made a part hereof and marked "A";

1.2. Construct and maintain said tracks, reserving, however, (a) title to all of the track except the track shown in [fol. 118] mauve color on said "Exhibit A"; (b) the right to extend, maintain, relocate, reconstruct and renew said tracks and appurtenances; (c) the right to use said tracks when not to the detriment of the Industry;

1.3. Upon termination hereof and full and faithful discharge of all the Industry's covenants herein, take up and deliver to the Industry such part of the track material as forms part of track shown in Mauve color on said "Exhibit A" on their rights of way at the sole risk and expense of the Industry.

2. Industry covenants and agrees that it will:

2.1. Furnish such rights of way, release of damages to property, and franchises for the construction and operation of said tracks as the Railways may require;

2.2. Pay first party (a) annually in advance, commencing one year from date hereof, ten cent- (10¢) for each foot of 3,042.3 feet of said tracks shown in green and mauve colors on said plat for the maintenance thereof, and (b) all taxes and special assessments which may be specifically assessed against said portion of said tracks;

2.3. Pay second party (a) annually in advance, commencing one year from date hereof, ten cents (10¢) for each foot of 1,067.2 feet of said tracks shown in yellow color on said plat for the maintenance thereof, and (b) all taxes and special assessments which may be specifically assessed against said portion of said tracks;

[fol. 119] 2.4. Not place or suffer to be placed any article or structure nor make any excavation upon its premises nearer said tracks than eight and one-half (8½) feet from the center of said tracks, nor nearer than twenty-five (25) feet above top of the rails. The Industry, for itself, successors ans assigns, assumes all responsibility for and agrees to protect and save harmless the Railways and the successors, lessees and assigns thereof from and against all loss, damage and expense caused by or arising out of the placing of any article or structure or making of any excavation at any place prohibited by this section, whether the negligence of the Railways or either of them shall contribute to the injury of person or property or not;

2.5. Not abandon the use of said tracks for a period of longer than six months, nor voluntarily nor involuntarily assign any right hereunder granted it, or sublet said tracks without Railway's written consent, nor permit trespassing upon said tracks by third persons.

3. Railways covenant and agree as between themselves that:

3.1. First party owns the 2,106.1 feet of said tracks shown in red and green colors on said plat and shall maintain the 266 feet of said tracks shown in red color at its sole expense and risk;

3.2. Second party owns the 1,251.2 feet of said tracks [fol. 120] shown in brown and yellow colors on said plat and shall maintain the 184 feet of said tracks shown in brown color at its sole expense and risk.

4. The parties mutually covenant and agree that:

4.1. They will, and their successors and assigns shall, assume respectively and indemnify each other against liability for damages caused by them (which term shall include injury to persons and property, deaths and expenses incident thereto, arising during or by reason of the construction, reconstruction, use, abandonment, operation or maintenance of the tracks described in Section 1.1 hereof by the parties), which shall be borne as follows: (a) Damages caused by a party, its employees, officers, agents, passengers, bailors, shippers, licensees and invitees shall be borne by such party; (b) damages suffered by all other persons, if occasioned by the act or omission of a party or parties, whether or not concurring with that of some other person, shall, as between the parties, be borne by such party or parties; otherwise such damages shall be borne by the parties equally. Industry assumes responsibility for, and indemnifies Railways against, loss or damage to Industry's property or to property upon its premises, regardless of Railway's negligence, arising from fire caused by Railway's locomotives operated for serving Industry, except to Railway's property and to shipments in the course of transportation;

[fol. 121] 4.2. Title to track paid for by Industry shall be in Industry, but such track shall be under the exclusive direction and control of Railways or either of them when operating over same;

4.3. Should additional industries be now or hereafter served by said spur track, all amounts subsequently payable under sections 2.2 and 2.3 hereof shall be divided among and paid equally by all the industries located thereon;

4.4. Unless sooner terminated, as it may be at the option of the Railways upon breach by the Industry of any of its covenants herein, or should Industry fail to give Railways sufficient business to warrant the continuation of this agreement, the terms of this agreement shall be for a term of one year from the date hereof, and thereafter from year to year until either party hereto shall give notice in writing to the other, thirty days prior to the expiration of any yearly term, of its intention not to renew the same. If

either of the Railways shall elect to terminate in accordance herewith, it may remove its track, subject to the right of the other Railway or the Industry to purchase, at a fair price, any portion of said track desired by it and lying beyond the clearance point of the Railway desiring to quit;

4.5. The covenants, terms and conditions, rights and obligations of this agreement shall inure to the benefit of and be binding upon any owner, lessor and/or operator of the parties or upon any person, firm or corporation claiming by, under, or through them;

[fol. 122] 4.6. This contract supersedes and cancels contract dated July 26, 1893, between first party and the Crescent Oil Company; contract dated March 18, 1903, between first party and Dixie Cotton Oil Company, and contract dated June 1, 1914, between first and second parties hereto.

In witness whereof the parties hereto have caused this instrument to be executed in triplicate, the day and year first above written.

St. Louis Southwestern Railway Company, (S.) by F. W. Green, Its Vice-President. Attest: Carlton Messick, Secretary. The Chicago, Rock Island and Pacific Railway Company, by (S.) A. B. Warner, Its General Manager. Attest: (S.) W. Vanderpool, Secretary. National Cottonseed Products Corporation, by (S.) E. Rice, Its President. Attest: (S.) D. L. Bunby, Secretary.

Approved as to ownership, assessment and taxation of property.

By (S.) J. B. Angell, Real Estate and Tax Commissioner.

Approved.

(S.) W. E. McGraw, by E. W. Meyer, General Superintendent.

[fol. 123] Approved.

(S.) J. A. McDougal, Superintendent.

Approved.

(S.) J. A. Stewart, Industrial Commissioner.

Form Approved.

B. E. Dwinell, General Attorney.

[fol. 124] BEFORE RAILROAD COMMISSION OF ARKANSAS

[Title omitted]

ORDER DENYING PETITION OF MISSOURI PACIFIC RAILROAD CO.—Sept. 16, 1930

Be it remembered that on the 16th day of September, 1930, there came on to be heard the above entitled cause, being the petition of the Missouri Pacific Railroad Company for authority to construct a crossing of a spur track extending from a point on the main line of the Missouri Pacific Railroad Company in North Little Rock, Arkansas, to the plant of the Dixie Cotton Oil Company, with an existing spur track of the St. Louis Southwestern Railway Company, extending from its old main line track about 500 feet to the property of the Arkansas Power and Light Company, such proposed crossing to be constructed approximately 265 feet eastwardly from said old main line track. [fol. 125] And both the Missouri Pacific Railroad Company and the St. Louis Southwestern Railway Company, having appeared by their attorneys and offered evidence,

And the Commission, after having heard all the evidence and after having taken the case under advisement, and after having made a personal inspection of all the physical properties described in the petition and involved in this proceeding, is of the opinion that said application should be denied.

It is, therefore by the Commission on this day ordered, That the petition of the Missouri Pacific Railroad Company for permission to cross with its proposed track the spur track of St. Louis Southwestern Railway Company in the city of North Little Rock, Pulaski County, Arkansas, more fully set forth in said petition, be and the same is hereby denied.

By order of the Commission.

(Signed) Grady Hays, Secretary. (Seal.)

Decision rendered February 12, 1931.

Order issued February 16th, 1931.

CC. Hon. J. R. Turney, Vice Pres., St. Louis Southwestern Ry. Co., St. Louis, Mo.; Hon. R. E. Wiley, Gen. Atty., Mo. Pac. R. R. Co., Boyle Bldg., City.

[fol. 126] BEFORE RAILROAD COMMISSION OF ARKANSAS

[Title omitted]

PETITION OF THE MISSOURI PACIFIC RAILROAD COMPANY FOR REHEARING—Filed Febr. 23, 1931

The Missouri Pacific Railroad Company petitions for rehearing and for cause states:

1

The Commission in denying the petition has overlooked that it is without authority to deny the crossing. The Constitution and Statutes guarantee a crossing to petitioner and the petitioner herein has asked that this Commission fix the terms and manner of crossing, etc., as prayed in the petition and not that the Commission give it the right to cross. The Commission has therefore exceeded its authority and jurisdiction in issuing an order denying the right of petitioner to cross the tracks of the St. Louis Southwestern Railway Company.

[fol. 127]

2

The Commission has overlooked that the track of the St. Louis Southwestern Railway Company, sought to be crossed, is an inactive track and that no trains are in operation or running over it except at long intervals of time, perhaps not more than once in several months, and the crossing would therefore not interfere even in a slight degree with the operation of the track.

3

The attorney, Mr. Kiskaddon, who was here at the hearing for the respondent, St. Louis Southwestern Railway Company, made a formal offer of conditions on which the St. Louis Southwestern Railway Company would permit petitioner a satisfactory substitute for crossing said track and after the offer was made petitioner formally accepted the proposition in a letter as will more fully appear by the following.

The officer of the St. Louis Southwestern Railway Company, charged with authority on the premises, has prior to

the filing of this petition, in writing addressed to the petitioner, offered to permit petition- to use four hundred feet additional of St. Louis Southwestern Railway Company's main line or sufficient for petitioner to reach and serve Dixie Cotton Oil Mill and the contract rights to use the tracks therein upon condition that petitioner extend right [fol. 128] to St. Louis Southwestern Railway Company to use its tracks at Pine Bluff, sufficient to serve the Norton-Wheeler Plant plus the recognition by petitioner of a contract executed by the old Argenta Terminal Railroad before petitioner purchased it under which it is claimed the St. Louis Southwestern Railway Company is given perpetual rights for the use of that line and the Argenta Terminal prohibited from building any spurs paralleling certain portions of the road.

Petitioner claims it is not bound by the terms of the contract last above mentioned and declined to recognize the contract as binding or to waive its contention that it was not. The dispute between the St. Louis Southwestern Railway and petitioner as to the applicability to petitioner of said contract was the chief reason preventing them from contracting for petitioner to serve the Dixie Cotton Oil Plant and the chief reason for the construction of the track which crossed the St. Louis Southwestern Railway Company's spur and occasioned this petition.

At the hearing the agent and attorney for the St. Louis Southwestern Railway Company, aforesaid, formally, before the Commission, waived the condition with reference to the contract last aforesaid and made the definite offer to carry out the proposition which has been previously made without the condition of petitioner, admitting itself bound by the contract as will appear from the following quotation from the record herein:

Mr. Kiskaddon: "Mr. Rockenback testified the Argenta [fol. 129] Terminal proposition is out—the property contract—and their contract does not concern us. The proposition now open is we will give rights over 400′ into the Dixie mill if they will give us rights over some tracks into the Norton-Wheeler Stave Company at Pine Bluff. That is all that is open. That proposition is open right now."

That proposition was always acceptable to petitioner and immediately following the hearing the authorized

operating officer, Mr. J. Cannon, Vice President and General Manager of petitioner, wrote a letter to the authorized officer of the St. Louis Southwestern Railway Company, accepting that proposition, which letter as to words and figures is stated following, to wit:

September 30, 1930.

J-C-33296.

Mr. C. C. Rockenback, Industrial Commissioner, St. Louis Southwestern Railway Lines, St. Louis, Missouri.

Dear Sir: Referring to the hearing had before Arkansas Railroad Commission, Case No. 783, at Little Rock, Arkansas on September 16th, of our application to cross your spur serving the plant of Arkansas Light & Power Company at North Little Rock, Arkansas, with an industrial lead track into the old Dixie Cotton Oil Company's [fol. 130] plant, now operated by National Cotton Seed Products Corporation.

On reviewing the testimony presented at this hearing, I find that you introduced and read before the Commission your proposition to the undersigned of June 8th, 1930, as written under your files G-284-32 and G-284-36-A as supplemented by your letter of June 9th, 1930, wherein you made the following proposition, conditioned upon our company recognizing a contract your company had entered into with the Argenta Terminal Railroad Company of date April 20th, 1916, prior to our having purchased its physical properties, viz:

"This company is agreeable to permitting the Missouri Pacific to use, under the terms of the contract between our companies dated the 24th day of September, 1925, 400 additional feet of its old main line or sufficient to enable your company to reach with our connection serving the Dixie Cotton Oil Mill and to also grant you under the terms of the same contract the right to use the track of the industry owned by this company upon the following conditions:

"That this Company's rights under contract with your company dated April 30th, 1926, covering the use of your main line at Pine Bluff, Arkansas, in connection with track serving the Seaman-Dunning Corporation, be extended westwardly a distance of approximately 1,000' to a point [fol. 131] opposite the center of Block 17 of Monks North-

western Addition to Pine Bluff, with the right upon the part of this company to have your company construct and thereafter maintain at this company's expense a connection with the track serving the Norton-Wheeler plant, or alternatively if you are unwilling to construct such additional track that our trackage rights under the said contract be extended westwardly a distance of 400′ west of the head-block of the plant track now serving the Norton-Wheeler Stave Company. In either of these cases, we will also be given the right to use the tracks serving the plant of the Norton-Wheeler Stave Company."

I further find that after your letter making the above proposition was read before the Commission and certain testimony given in connection therewith, your attorney, Mr. Kiskaddon, made the following statement as having been testified to by you:

"Mr. Rockenback testified the Argenta Terminal proposition is out—the property contract—and their contract does not concern us. The proposition now open is we will give rights over 400′ into the Dixie Mill if they will give us right over some tracks into the Norton-Wheeler Stave Company at Pine Bluff. That is all that is open. That proposition is open right now."

Is my understanding correct that your company is now ready to negotiate a contract granting our company additional right over your old main track at North Little Rock into the Dixie Plant as an exchange for our company grant-[fol. 132] ing you additional trackage rights at Pine Bluff, Arkansas, the right to reach and serve the plant of the Norton Wheeler Stave Company at that point? If so, I am ready to proceed to work out with you, or anyone else that you may designate to handle for your company, the details of the contracts under which each would grant to the other these extended trackage rights. It is understood, of course, that your grant to our company or right of use of some 400 feet additional grant to you at Pine Bluff your right of use of the tracks now serving Norton-Wheeler Stave Company.

Would be pleased to hear from you in respect of this matter.

Yours truly, (Sgd.) J. Cannon, per R. C. White.

After waiting more than six weeks, St. Louis Southwestern Railway Company replied repudiating the offer and declined to carry out the proposition.

St. Louis Southwestern Railway Lines, Industrial Department, St. Louis

Files G-284-36-A, G-284-32

November 19, 1930.

Mr. J. Cannon, Vice-President & General Manager, Missouri Pacific Railroad Company, St. Louis, Mo.

[fol. 133] Dear Sir: In reply to your letter of September 30th, file J-C-33296, and subsequent telephone conversation with Assistant General Manager, Mr. R. C. White, will advise that I have conferred with our Assistant General Solicitor, Mr. A. H. Kiskaddon, as to the nature of the offer made in the hearing at Little Rock. Mr. Kiskaddon has secured a copy of those portions of the transcript which cover the offer and advises me that it was his intention to review the proposition which had been made in my letters to the Missouri Pacific prior to the hearing and which were read in evidence. That proposition involves the exchange of trackage rights, with which you are familiar, and the recognition of the contract of April 20th, 1916, between the St. Louis Southwestern Railway Company and Argenta Terminal Railroad Company. This will be apparent from a reading of Mr. Kiskaddon's direct examination of myself when I was on the stand.

He further advised me that the apparent limitation of the proposition to a mere exchange of trackage rights, made in the colloquy at the close of the case and correctly quoted in your letter, must be read in connection with his examination of myself and in the light of the objections he was making at that point to an attack by the Missouri Pacific on the validity of the contract.

This is also my recollection of the offer.

Delay in answering your letter was occasioned by Mr. [fol. 134] Kiskaddon's absence from the city.

Very truly yours, (Sgd.) C. C. Rockenback, Industrial Commissioner.

Petitioner states that it has ever been and is now agreeable to accepting the offer as indicated without the condition of recognition of the disputed contract of the Argenta Terminal Railroad Company as last described and is willing to have an order made to that effect.

Wherefore petitioner prays the Commission to rehear this matter and that its order denying the petition be revoked and an order entered fixing the terms of the crossing as prayed in the petition or in the alternative requiring the St. Louis Southwestern Railway Company to contract for the use of the 400 or the necessary number of feet of its main line or tracks in the Dixie Cotton Oil mill without the recognition of Argenta Terminal Railroad Company's contract.

(Signed) R. E. Wiley, Attorney for Petitioner.

[fol. 135] Before Railroad Commission of Arkansas

[Title omitted]

Order Denying Petition for Rehearing—March 6, 1931

The Commission after having duly considered the petition of the Missouri Pacific Railroad Company for rehearing in the above entitled cause, and being well and sufficiently advised in the premises.

It is by the Commission on this day ordered that the petition of the Missouri Pacific Railroad Company for rehearing in this case be and the same is hereby denied.

By order of the Commission.

[fol. 136] (Sgd.) Grady Hays, Secretary. (Seal.)

March 6, 1931.

Cc. Hon. R. E. Wiley, Gen. Atty., Missouri Pacific R. R. Co., Boyle Bldg., Little Rock, Arkansas; Hon. A. H. Kiskaddon, Asst. Gen. Sol., St. Louis Southwestern Railway Co., St. Louis, Missouri.

[fol. 137] Before Railroad Commission of Arkansas

[Title omitted]

Motion and Prayer for Appeal

The petitioner, Missouri Pacific Railroad Company, files this its written motion with the Arkansas Railroad Commission, and with Mr. Ed Harper, Member of the said Commission, and hereby prays for an appeal to the circuit court of Pulaski County from the order of the Arkansas Railroad Commission made herein on February 12, 1931, denying the petition of the Missouri Pacific Railroad Company for crossing with its proposed track the spur track of the St. Louis Southwestern Railway Company in the City of North Little Rock, Arkansas, and petitioner states that it is aggrieved by said order, and prays that same be reviewed by said court, and to that end that the transcript of the proceedings had before the Arkansas Railroad Commission in said matter, and of all the evidence be deposited [fol. 138] in the office of the Clerk of said Circuit Court, and upon review by said court that the order be quashed and that the petition be granted, and for all other relief to which the petitioner may be entitled either at law or in equity.

(Signed) R. E. Wiley, Attorney for Missouri Pacific Railroad Company.

[fol. 139] Reporter's certificate to foregoing transcript omitted in printing.

[fol. 140] Secretary's certificate to foregoing transcript omitted in printing.

[fol. 141] In Circuit Court of Pulaski County

Request of St. Louis Southwestern Railway Company for Findings and Declarations of Fact and of Law—Filed Dec. 12, 1931

Comes St. Louis Southwestern Railway Company and asks the court to make the following several findings and declarations of fact, to wit:

1. The track proposed to be constructed by the Missouri Pacific Railroad Company is an extension or expansion of its lines as distinguished from a spur or industrial track.

2. Missouri Pacific Railroad Company now has access over the track of St. Louis Southwestern Railway Company, to industries now in existence or in reasonable con- [fol. 142] templation in the future, which would be served by the track sought to be constructed.

3. The track sought to be constructed would be wholly competitive in that it would duplicate service already rendered by the track of St. Louis Southwestern Railway Company, or available to it.

4. All industrial territory already developed or subject to industrial development from the point of intersection or crossing of the St. Louis Southwestern Railway track south to the point where the proposed track would terminate is adequately served by the St. Louis Southwestern Railway track already constructed.

5. The construction of the track as proposed would hamper the St. Louis Southwestern Railway Company in the use of its track already constructed in that it would obstruct access from said St. Louis Southwestern Railway Company track into adjacent industrial territory now readily accessible from said track.

6. The proposed track would be used both in intrastate and interstate commerce.

Comes now the St. Louis Southwestern Railway Company and asks the court to make the following declarations of law, to wit:

1. Missouri Pacific Railroad Company could not lawfully construct the proposed track without first obtaining [fol. 143] from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity required, or will require the construction, or operation, or construction and operation of said track.

2. The securing by Missouri Pacific Railroad Company of certificate of present or future public convenience and necessity for said proposed track was a prerequisite and condition precedent to any power or authority of the Arkan-

sas Railroad Commission to grant its application to cross or to fix the terms of any crossing of the track of St. Louis Southwestern Railway Company.

3. It was necessary for Missouri Pacific Railroad Company to obtain right of way for said proposed track either by contract or by condemnation proceedings before the Arkansas Railroad Commission had any authority to grant its application to cross the track of St. Louis Southwestern Railway Company or to fix the terms of any such crossing.

Carter, Jones & Turney, Lamb & Adams, Attorneys for St. Louis Southwestern Railway Company.

(Endorsed:) "Above requests for findings of Law & Fact are separately refused."

[fol. 144] [File endorsement omitted.]

The Court thereupon refused each and every request for findings and declarations of fact and of law; to which action of the Court in refusing said requests for findings and declarations of fact and of law the said respondent, St. Louis Southwestern Railway Company, at the time excepted, and asked that its several exceptions be noted of record, which is hereby accordingly done.

IN CIRCUIT COURT OF PULASKI COUNTY

ORDER QUASHING ORDER OF ARKANSAS RAILWAY COMMISSION

Thereupon the Court, after hearing all of the evidence in the cause and the argument of counsel, and being well and sufficiently advised as to all matters of law and fact herein, found the issues in favor of the petitioner, Missouri Pacific Railroad Company; and that the order of the Arkansas Railroad Company denying the petition of said petitioner for a crossing be quashed; and further ordered that the said petitioner, Missouri Pacific Railroad Company, have a crossing for its proposed spur industrial track over the spur track of the St. Louis Southwestern Railway Company in North Little Rock which serves the Arkansas Power [fol. 145] & Light Company's Transformer station, as

prayed for in its petition; and doth order that action in conformity with the finding and order of this Court be taken by the Arkansas Railroad Commission.

IN CIRCUIT COURT OF PULASKI COUNTY

* * * * * * *

DOCKET ENTRIES

Thereupon, on the same day, the Respondent, St. Louis Southwestern Railway Company, filed with the clerk of this court its motion for a new trial, which motion for a new trial is, in words and figures, as follows, to wit:

(See page 178 for Motion for New Trial.)

* * * * * * *

Thereupon, on the same day, to wit, the 24th day of December, 1931, the motion for a new trial of the respondent, St. Louis Southwestern Railway Company, was overruled by the Court; to which action of the Court the Respondent, St. Louis Southwestern Railway Company, at the time excepted and caused its exceptions to be noted of record.

* * * * * * *

Thereupon said respondent, St. Louis Southwestern Railway Company, prayed and was granted an appeal to the [fol. 146] Supreme Court of Arkansas and requested sixty days within which to prepare and file a bill of exceptions, which, within the time allowed by the Court, to wit: On the 5th day of February, 1932, was duly filed with the Clerk of said Court.

IN CIRCUIT COURT OF PULASKI COUNTY

* * * * * * *

ORDER APPROVING BILL OF EXCEPTIONS—Febr. 5, 1932

The foregoing bill of exceptions was presented to me, on this 5 day of February, 1932, was examined and found cor-

rect and same is ordered filed with the Clerk of this Court as a part of the record in this cause.

Richard M. Mann, Judge Second Division, Pulaski Circuit Court.

[fol. 147] Stenographer's certificate to foregoing omitted in printing.

[fol. 148] In Circuit Court of Pulaski County

[Title omitted]

Docket Entry—Dec. 12, 1931

On this day comes St. Louis Southwestern Railway Company by its attorneys, Carter, Jones & Turney, and by leave of the Court files herein its request for findings and declarations of fact and of law.

[fol. 149] In Circuit Court of Pulaski County

[Title omitted]

Judgment—Dec. 24, 1931

This cause coming on for consideration and final judgment on appeal from the Arkansas Railroad Commission now come the appellant, Missouri Pacific Railroad Company, by its attorney R. E. Wiley and the respondent, St. Louis Southwestern Railway Company by its attorney N. F. Lamb and the cause being submitted on the transcript of proceedings and evidence filed herein by the Arkansas Railroad Commission and the Court being sufficiently advised doth find the issues in favor of the Missouri Pacific Railroad Company.

Wherefore it is by the court considered, ordered and adjudged that the order of the Arkansas Railroad Commission denying appellant's petition for a crossing be quashed and that the appellant, Missouri Pacific Railroad Company have a crossing for its proposed spur industrial track over the St. Louis Southwestern Railway Company's spur track in North Little Rock which serves the Arkansas Power &

Light Company's transformer station at a point on said spur track approximately 265 feet easterly from its switch connection with the main lead switch or old main line of the St. Louis Southwestern Railway Company and at grade and that this order be certified to the Arkansas Railroad Commission that action be taken by said Commission in conformity therewith.

[fol. 150] IN CIRCUIT COURT OF PULASKI COUNTY

[Title omitted]

MOTION FOR NEW TRIAL BY ST. LOUIS SOUTHWESTERN RAILWAY COMPANY—Filed Dec. 24, 1931

Comes St. Louis Southwestern Railway Company and moves the Court to set aside the judgment in this cause and grant to it a new trial for the following reasons, to wit:

1. The Court erred in refusing to find that the track proposed to be constructed by Missouri Pacific Railroad Com-
[fol. 151] pany is an extension or expansion of its lines as distinguished from a spur or industrial track.

2. The court erred in refusing to find that the track sought to be constructed by Missouri Pacific Railroad Company would be competitive in that it would duplicate service already rendered by St. Louis Southwestern Railway Company whose tracks were available to Missouri Pacific Railroad Company.

3. The court erred in refusing to find that the industrial territory already developed or subject to industrial development from the point of intersection or crossing of the St. Louis Southwestern Railway track south of the point where the proposed track of Missouri Pacific Railroad Company would terminate is adequately served by St. Louis Southwestern Railway Company over tracks already constructed.

4. The court erred in refusing to find that the proposed track would interfere with St. Louis Southwestern Railway Company in the use of its tracks already constructed and

would prevent access by St. Louis Southwestern Railway Company into adjacent industrial territory not readily accessible from its tracks.

5. The court erred in holding as a matter of law that Missouri Pacific Railroad Company is authorized to construct its proposed track without first obtaining from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity re-
[fol. 152] quired, or will require the construction or operation of said track.

6. The court erred in holding as matter of law that Missouri Pacific Railroad Company has any right to procure right or permission to cross the railway tracks of St. Louis Southwestern Railway Company without first either condemning right-of-way across said track or procuring such permission by contract or agreement with St. Louis Southwestern Railway Company.

7. The Court erred in finding in favor of Missouri Pacific Railroad Company.

Lamb & Adams, Attorneys for St. Louis Southwestern Railway Company.

[File endorsement omitted.]

[fol. 153] In Circuit Court of Pulaski County

[Title omitted]

Order Overruling Motion for New Trial—Dec. 24, 1931

This cause today, December 24, 1931, came on for hearing upon motion of St. Louis Southwestern Railway Company for a new trial herein. Being advised in the premises the Court overrules said motion for new trial, to which ruling of the court St. Louis Southwestern Railway Company at the time objected and excepted and asked that its exceptions be noted of record which was done.

Thereupon St. Louis Southwestern Railway Company prayed an appeal to the Supreme Court which was granted and it is allowed sixty days in which to present and file its bill of exceptions herein.

[fol. 154] In Circuit Court of Pulaski County

[Title omitted]

Minute Entry—Febr. 5, 1932

On this day comes the respondent, St. Louis Southwestern Railway Company, by its attorney, N. F. Lamb, Esq., and presents to the Court its bill of exceptions herein; and said bill of exceptions, after being examined in open court and found to be in all things correct, is approved in open court, is signed by the Judge, and same is ordered filed as a part of the record in this cause.

[fols. 155 & 156] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 157] [Caption omitted]

In Supreme Court of Arkansas

St. Louis Southwestern Railway Company, Appellant,

v.

Missouri Pacific Railroad Company, Appellee

Appeal from Pulaski Circuit Court, Second Division

Judgment—May 16, 1932

This cause came on to be heard upon the transcript of the record of the circuit court of Pulaski County, Second Division, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things affirmed with costs.

It is further considered that said appellee recover of said appellant and United States Fidelity & Guaranty Com-

pany of Baltimore, Maryland, surety in the special supersedeas bond filed in this cause, all its costs in this Court and the court below in this cause expended, and have execution thereof.

[fol. 158] IN SUPREME COURT OF ARKANSAS

[Title omitted]

OPINION—May 16, 1932

HUMPHREYS, J.:

Appellee, a railroad company doing an interstate and intrastate business, and owning terminal facilities in North Little Rock, Arkansas, filed its application with the Arkansas Railroad Commission under Sec. 1643 of Crawford & Moses' Digest to fix the point and manner of crossing with a proposed spur, an industrial track of appellant, for the purpose of serving directly the cotton seed oil plant in North Little Rock, which proposed spur was to extend from its own track a distance of 5640 feet in a south and southeasterly direction to the plant and property of said National Cotton Seed Products Company. Notice was given to appellant, and the application and appellant's objections thereto were heard upon testimony adduced by each with the result that appellee's application was denied, from which an appeal was prosecuted to the circuit court. The circuit court heard the cause, quashed the order of the commission, and fixed the point of crossing at grade 265 feet east from its switch connection with the main lead switch or old main line of the St. Louis Southwestern Railway Company and directed the commission to proceed in conformity with its order, from which is this appeal.

Appellant contends the circuit court erred in directing [fol. 159] the Commission to fix the point and manner of crossing because, first; under the statute it has no authority to act until appellee acquires the right of way by condemnation proceedings, and second; until it obtains a certificate of convenience and necessity for the crossing from the Interstate Commerce Commission as provided by paragraph 17 of section 1 of the Interstate Commerce Act.

(1) The section of Crawford & Moses' Digest referred to and made the basis of appellee's petition, in so far as applicable here, is as follows:

"Crossings.—The Commission shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expenses, use and protection of each crossing of one railroad by another railroad, or street railroad by a railroad, so far as applicable * * *."

It will be observed that there is nothing in the statute relative to a condemnation of the right of way before the commission can proceed to fix the place and manner of a proposed crossing of one railroad by another. The legal right of one railroad to cross another exists by virtue of Sec. 1 of Article XVII of our Constitution, which is as follows:

"Every railroad company shall have the right with its road to intersect, cross and connect with any other road."

[fol. 160] Therefore it is unnecessary to acquire a legal right for railroads to cross or intersect each other by a proceeding in court. As stated above, that right exists under our constitution. Of course, it would be necessary if railroads could not agree as to the compensation or damages to condemn the right of way in order to determine the amount of compensation or damage, but it seems to us that the orderly way would be to first fix the place and manner of crossing and then proceed in the proper tribunal to condemn the land needed to effect the crossing at the place fixed or designated. The case of *N.* K. & T. R. Co. v. Cotton Belt, 239 S. W. 337 (Tex.), cited by appellant in support of its contention that condemnation proceedings must be brought and determined before the commission can fix the place and manner of crossing, has no application in the instant case because in Texas the right to cross must first be determined by the judgment of a court; whereas, in this State the Constitution fixes the right to cross.

(2) Paragraph 18, Sec. 1 of the Interstate Commerce Act referred to by appellant in support of its second contention, in so far as applicable, is as follows:

"(18) Extension or abandonment of lines; certificates required. * * * No carrier by railroad subject to this

chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chap- [fol. 161] ter over or by means of such additional or extended line of railroad, unless and until there first shall have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation of such additional or extended line of railroad. * * *."

The above paragraph is limited by paragraph 22 of said section and is as follows:

"(22) Construction, etc., of spurs, switches, etc., within State. The authority of the commission conferred by paragraphs (18) to (21) both inclusive, shall not extend to the construction or abandonment of spurs, industrial, team, switching or side tracks, located wholly within one State, or of street suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

After a careful reading and analysis of the evidence adduced in the instant case, the court has concluded that the proposed improvement is a spur within the meaning of paragraph 22 and not an extension of the line of appellee's railroad within the meaning of Sec. 18. The proposed improvement being a spur only, it was unnecessary to obtain a certificate of convenience and necessity for a crossing from the Interstate Commerce Commission before appellee could file its application before the Railroad Commission of Arkansas to fix the place and manner of the crossing.

The judgment of the circuit court is, therefore, affirmed.

[fols. 162 & 163] Petition for rehearing, covering two pages, filed May 31, 1932, omitted from this print. It was denied and nothing more by order June 13, 1932.

[fol. 164] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—June 13, 1932

Being fully advised, the petition for rehearing filed herein is by the court overruled.

[fols. 165 & 166] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER STAYING JUDGMENT—Filed June 27, 1932

On this day comes appellant, St. Louis Southwestern Railway Company, and by its petition filed herein represents to the Court that it proposes to file with the Supreme Court of the United States a petition for a writ of certiorari to the end that the judgment of this court heretofore rendered herein may be stayed pending its application for writ of certiorari and determination thereof.

Appellant has filed bond in the sum of $5,000 with good and sufficient surety with the Clerk of this Court, conditioned as provided by law.

Wherefore it is considered, ordered and adjudged that the judgment heretofore rendered in this cause be and it is hereby stayed for — days from this date, pending appellant's application for said writ of certiorari, such stay to be effective until such application shall be abandoned or until the same shall be determined by the Supreme Court of the United States.

Jesse C. Hart, Chief Justice.

[File endorsement omitted.]

[fol. 167] Cost bond on stay for $5,000, filed June 27, 1932, omitted in printing.

[fol. 168] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 24, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Arkansas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 364

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PETITIONER,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS AND BRIEF IN SUPPORT THEREOF.

HAROLD R. SMALL,
Attorney for Petitioner.

ADAIR DYER,
N. F. LAMB,
ARTHUR L. ADAMS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 364

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PETITIONER,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, St. Louis Southwestern Railway Company, a corporation, respectfully presents to this Court this its petition for a writ of certiorari addressed to the Supreme Court of the State of Arkansas commanding said Court and the Clerk thereof to certify to this Court the record and proceedings of the case in

said court wherein your petitioner was appellant and Missouri Pacific Railroad Company was respondent, for review and determination of said cause by this Court.

Statement of Facts.

Petitioner seeks a review by certiorari of a judgment of the Supreme Court of Arkansas affirming a judgment of the Circuit Court of Pulaski County, Arkansas, reversing an order of the Arkansas Railroad Commission.

August 5, 1930, respondent, Missouri Pacific Railroad Company filed with the Arkansas Railroad Commission its petition for a crossing by a proposed track of respondent over a track of petitioner St. Louis Southwestern Railway Company (R. 2-3), pursuant to Section 8417q1 of 1927 Supplement of Crawford & Moses Digest of the Statutes of Arkansas, as follows:

> "The commission shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expenses, use and protection of each crossing of one railroad by another railroad, or street railroad by a railroad, so far as applicable, and to alter or abolish any such crossing, and to require where, in its judgment, it would be practical a separation of grades of any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made, and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided be-

tween the railroad or street railroad corporations, affected or between such corporations and the state, county, municipality or other public authority in interest. Act April 1, 1919, p. 411, sec. 9; Crawford & Moses' Digest, sec. 1643."

At the same time there was in effect Paragraph 18 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, Section 403 (49 U. S. C. A. Section 1 (18)), as follows:

"(18) Extension or Abandonment of Lines; Certificates Required.—No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire, or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

There was also at the same time in force and effect Paragraph 22 of Section 1, as follows:

"(22) Construction, etc., of Spurs, Switches, etc., within state.—The authority of the commis-

> sion conferred by paragraphs (18) to (21) both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or sidetracks, located wholly within one state, or of street suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

On February 12, 1931, the Arkansas Railroad Commission after hearing held that the Missouri Pacific Railroad Company was not entitled to the order prayed for, and denied the application (R. 77, 83).

The Missouri Pacific Railroad Company appealed to the Circuit Court of Pulaski County, Arkansas (R. 84).

On December 9, 1931, that court found for respondent Missouri Pacific Railroad Company, ordered that the order of the Arkansas Railroad Commission denying the petition of the Missouri Pacific be quashed and further ordered that the Missouri Pacific have a crossing "for its proposed spur industrial track over the spur track of the St. Louis Southwestern Railway Company in North Little Rock" * * * "as prayed for in its petition" and ordered that action in conformity with the finding and order of the court be taken by the Arkansas Railroad Commission (R. 86-87).

May 16, 1932, on appeal by petitioner the Arkansas Supreme Court affirmed the judgment of the Circuit Court, with opinion (R. pp. 91 to 94), holding the proposed track of respondent to be a spur and not an extension of the line of respondent and being a spur only "it was unnecessary to obtain a certificate of con-

venience and necessity for a crossing from the Interstate Commerce Commission before appellee could file its application before the Railroad Commission of Arkansas to fix the place and manner of the crossing" (R. 94).

Petition for rehearing (R. 94), was by the Arkansas Supreme Court on June 13, 1932, overruled. The judgment was stayed June 27, 1932 pending application for certiorari (R. 164).

The question involved is whether the proposed track of the Missouri Pacific is a spur track or an extension.

The proposed track is to begin at present Missouri Pacific tracks in North Little Rock, Arkansas, and is to run south and southeast 4338.4 feet to the proposed crossing of petitioner's track, and thence beyond the crossing a distance of an additional 848.6 feet, or a total of 5,187 feet, to the plant of the Dixie Cotton Oil Company (R. 9-10). See Respondent's "Petitioner's Exhibit No. 1" (R. 69). The cost was estimated at $25,000 or more (R. 53).

The present track of petitioner, St. Louis Southwestern Railway Company now serves the Dixie Cotton Oil Company plant and traffic between Dixie Cotton Oil Company plant and present Missouri Pacific traffic moves over the tracks of petitioner (R. 43). Adequate service is given (R. 43-44). *The proposed track is to serve territory at present served by petitioner.* After crossing one track of petitioner it then is to parallel and adjoin and the old main line or, as it is now called, the industrial lead track of petitioner to the Dixie Cotton Oil Company plant, and by such par-

allel location will physically bar petitioner from access to its territory.

The purpose is to duplicate facilities and service to the Dixie Cotton Oil Company now furnished by petitioner, and the proposal is further to duplicate facilities and service now furnished by the Cotton Belt throughout that district, and in a manner barring petitioner from its own territory (R. 29-31).

The contention of petitioner is that the proposed duplication of service and facilities by the Missouri Pacific comes within Paragraph 18 of Section 1 of the Interstate Commerce Act which requires as a condition precedent the approval of the Federal Commission before any extension can lawfully be made.

The contention of the Missouri Pacific, on the contrary, is that the proposed track is a spur within the meaning of Paragraph 22 of Section 1 of the Interstate Commerce Act, and therefore such approval is not required.

The record shows that the proposed facilities amount to an extension (R. 31-32).

The proposed track is to extend respondent's line substantially into territory not heretofore served by respondent and now served adequately by petitioner (R. 9-68 especially 26-27 and 31-32).

The Circuit Court and the Supreme Court of Arkansas notwithstanding held that the proposed facilities amounted to a spur track and that the Missouri Pacific was entitled to effect a crossing of the spur track of petitioner for its proposed spur track without Interstate Commerce Commission approval.

A railroad company is not required to secure the approval of the Arkansas Railroad Commission for an Arkansas spur track. It is, however, required to obtain the approval of such Commission if the spur track crosses the track of another railroad company. (Section 8417q1 of 1927 Supplement to Crawford & Moses Digest of Statutes of Arkansas). By the Interstate Commerce Act, Paragraph 22 of Section 1, no approval of the Interstate Commerce Commission is required for a spur track.

The Interstate Commerce Commission's approval, however, is required by Paragraph 18 *of Section* 1 *for a track that amounts to an extension. This proposed track is, as stated, an extension.*

Reasons Relied on for Issuance of the Writ.

I.

The proposed track of respondent, being an extension within the meaning of Paragraph 18 *of Section I of the Interstate Commerce Act, the approval of the Interstate Commerce Commission was a condition precedent to its construction, maintenance and operation in the proposed location across the spur track of petitioner and paralleling petitioner's main industrial lead track.*

Without such Federal authority, Arkansas was without power "to fix the place and manner of crossing" petitioner's track with respondent's unauthorized extension track.

Texas & Pacific Railroad Co. v. *Gulf Colorado & S. F. R. R. Co.*, 270 U. S. 266;

Detroit & M. Ry. Co. v. *Boyne City G. & A. R. Co.*, 286 Fed. 540;

Missouri Pacific R. R. Co. v. *Chicago, Rock Island & Pacific R. R. Co.*, 41 Fed. (2d) 190; *certiorari denied* 282 U. S. 866.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Honorable Court directed to the Supreme Court of the State of Arkansas, sitting at Little Rock, Arkansas, commanding that court to certify and send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Arkansas had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court as provided by law, and that the said judgment of the Supreme Court of the State of Arkansas be reversed by this Honorable Court, and for such further relief as may seem proper.

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY,
By HAROLD R. SMALL,
Attorney for Petitioner,
418 *Olive Street, St. Louis, Mo.*

ADAIR DYER,
N. F. LAMB,
ARTHUR L. ADAMS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 364

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, PETITIONER,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The judgment of the Supreme Court of Arkansas, rendered May 16, 1932, with opinion, is found at pages 91 to 94 of the Record. 49 S. W. (2d) 1054.

The motion for rehearing filed by petitioner was, on June 13, 1932, overruled (R. 95) and the judgment thereby became final (Section 2171 Crawford & Moses Digest of the Statutes of Arkansas).

II.

Jurisdiction.

(1) Jurisdiction for certiorari is conferred upon this Court by Section 237-b Federal Judicial Code as amended by the Act of February 13, 1925, 43 Stats. L. 936.

(2) The date when the judgment became final was June 13, 1932 (R. 95).

(3) Respondent sought from Arkansas under Arkansas Statute Section 8417q1 of 1927 Supplement to Crawford & Moses Digest of the Statutes of Arkansas a crossing over petitioner's track for a proposed trackage of respondent that was to be an extension and as such lacked the required approval and authority of the Interstate Commerce Commission under Paragraph 18 of Section I of the Interstate Commerce Act. Arkansas has nevertheless granted the order sought and thereby denied the Federal right of petitioner under said Paragraph 18 of Section I of the Interstate Commerce Act not to be subjected to such trackage of respondent without prior authority from the Interstate Commerce Commission.

(4) The following are believed to sustain the jurisdiction of this court:

Railroad Commission of California v. *Southern Pacific Co.*, 264 U. S. 331;

Interstate Commerce Commission v. *United States of America ex rel City of Los Angeles*, 280 U. S. 52;

Texas & Pacific R. Co. v. *Gulf Colorado & Santa Fe,* 270 U. S. 266.

III.

Statement of the Case.

It is requested that the statement in the petition be taken as the statement here.

IV.

Specification of Errors.

The Circuit and Supreme Courts of Arkansas erred in their holding that the proposed track of respondent was a spur and in failing to hold that it was an extension, and in failing to hold there was no right to construct, maintain or operate such track without the prior consent and approval of the Interstate Commerce Commission under Paragraph 18 of Section I of the Interstate Commerce Act, and in failing to hold that respondent had no authority to have the crossing in question without such authority for the proposed track.

The Circuit and Supreme Courts of Arkansas erred in failing to follow controlling Federal decisions.

Summary of Argument.

The proposed track of respondent is an extension within the meaning of Paragraph 18 of Section I of the Interstate Commerce Act.

As an extension, the approval of the Interstate Commerce Commission was required before respondent

was authorized to construct, maintain or operate the proposed track extension, or to secure authority from the Arkansas Railroad Commission with respect to a crossing of such proposed track over petitioner's tracks. Arkansas had no power to grant authority for an unauthorized track to cross over petitioner's track.

ARGUMENT.

The record clearly shows as a fact that the proposed track of respondent Missouri Pacific Railroad Company in the district in question was an extension.

The proposed track is 5,187 feet long and to cost $25,000 or more. It reaches the district now served adequately by petitioner—a district new to respondent.

In its proposed location where it would parallel the track of petitioner, the proposed track would furnish a physical barrier to petitioner against its serving its own district.

The situation is one especially requiring that the Interstate Commerce Commission determine whether public convenience and necessity would be served by the trackage of respondent in its proposed location.

The blueprint plat of respondent, Missouri Pacific Railroad Company, entitled "Petitioner's Exhibit No. 1", appearing at page 89 of the record, the evidence of record of respondent's witnesses as well as of petitioner's witnesses disclose clearly that the track is an extension as construed by the Federal courts.

The Arkansas Supreme Court held it a spur.

The Federal courts hold a track of the character of the proposed track an extension within the meaning of

Paragraph 18 of Section I of the Interstate Commerce Act.

In Texas & Pacific Railroad Co. v. *Gulf, Colorado & S. F. Rd. Co.*, 270 U. S. 266, the Texas & Pacific was serving a certain industrial district in the neighborhood of the city of Dallas. The Santa Fe desired to construct a track from its main line to the industries. The air-line distance was only three and one-half miles, but the length of the track would be seven and one-half miles. The Santa Fe contended that the track was a spur or industrial track within the meaning of Paragraph (22) of Section I of the Interstate Commerce Act, while the Texas & Pacific contended that it was an extension as that expression is used in Paragraph (18). In deciding such track to be an extension, this court said:

> "A truer guide to the meaning of the term 'extension' and 'industrial track' as used in Paragraphs 18 to 22 is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by the Transportation Act of 1920. By that measure Congress undertook to develop and maintain for the people of the United States an adequate railway system. It recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern. The property employed must be permitted to earn a reasonable return. * * * and that when a railroad inflicts injury upon its rival it may be the public which ultimately bears the loss * * * The act sought, among other things, to avert such losses."

Discussing the meaning of the terms "Spur, Industrial, Team, Switching or Side-tracks" this Court said:

> "Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply the facilities to others who being within the same territory and similarly situated are entitled to like services from the carrier. The question whether the construction should be allowed or compelled depends largely upon local conditions which the state regulating body is peculiarly fitted to appreciate. However, the expenditure involved is ordinarily small, but *where the proposed trackage extends into territory not theretofore served by the carrier and particularly where it extends into territory already served by another carrier its purpose and effect are under the new policy of Congress of national concern.* For invasion through new construction of territory adequately served by another carrier, like the establishment of excessively low rates in order to secure traffic enjoyed by another, may be inimical to the national interest. *If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of Paragraph* 18 *although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension it cannot be built unless the Federal Commission issue its certificate that the*

public necessity and convenience require its construction. The Hale Cement Line is clearly an extension within this rule."

In *Detroit & M. Ry. Co.* v. *Boyne City G. & A. R. Co.*, 286 Fed. 540, the two railroads intersected about five miles west of Alpine, Michigan. The Huron-Portland Cement Company owned a quarry near the intersection which was already served by a spur track of plaintiff railroad company. The defendant company proposed to construct a tract three and three-fourths miles long from its main line to said quarry. Plaintiff sought to enjoin such construction on the theory that the proposed track was an extension of defendant's line of railroad requiring a certificate of the Interstate Commerce Commission. The Federal court held the proposed track an extension:

> "Considering all of the facts and circumstances of the present case including the proposed operation of entire trains over the proposed track and the main line of defendant in continuous transportation and without switching movements or changes, considering the sidings and public loading stations to be constructed and used in connection with said track, considering the expense of the proposed undertaking, considering the competitive character and results of the contemplated use and operation of said track and trains, considering the fact that the proposed track and train service will be between points where the competing railroad now maintains stations and between which the competing railroad now operates a regular train service, and in view of the entire record, I reach the conclusion that *such pro-*

posed track has the characteristics and constitutes not a spur track but a new line more specifically an extension or a branch line."

In *Missouri Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 41 Fed. 2d, 190 (certiorari denied 282 U. S. 866) the Missouri Pacific proposed to build a track approximately 3,700 feet long in the *City of Little Rock.* The Circuit Court of Appeals decided that a certificate from the Commission was necessary. In this connection, after quoting extensively from the Dallas case (276 U. S. 266) above referred to, the court summed up its conclusions as follows:

> "We think the evidence in the case at bar establishes the following salient facts: That both railroads are engaged in interstate commerce; that the territory of limited area into which the proposed construction is to be projected is already occupied and served to a very considerable extent by the Rock Island; that it is entirely feasible for the whole territory to be occupied and served by the same railroad whenever necessary; that the Missouri Pacific is at present neither occupying nor serving said territory except with one spur track running a short distance south on Collins Street; that the introduction of the Missouri Pacific into this territory will prevent the natural growth of the business of the Rock Island in said territory and may very likely lessen its present business there; * * * When these facts are considered in the light of the principle of railway policy announced in the cases above cited, *we are led to the conclusion that the proposed construction must be held to be an exten-*

sion of the line of railroad of the Missouri Pacific within the meaning of Paragraph 18 of Section I.''

It is worthy of note that in deciding each of the proposed tracks considered in the above cases to be new railroads or extensions, requiring the issuance of certificates from the Interstate Commerce Commission, the courts used as tests such expressions as "when a railroad inflicts injury upon its rival," "where the proposed trackage extends into territory not theretofore served by the carrier," "where it extends into territory already served by another carrier," "invasion through new construction of territory adequately served by another carrier," "if the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory," "considering the competitive character and results of the contemplated use and operation," "between points where the competing railroad now maintains stations," "that the territory of limited area into which the proposed construction is to be projected is already occupied and served to a considerable extent," "that the introduction of the Missouri Pacific into this territory will prevent the natural growth of the business of the Rock Island in said territory."

The Missouri Pacific proposes to spend $25,000 or more to construct a track to an industry that is already, to all appearances, adequately served by tracks of the Rock Island and the Cotton Belt, and before the track can be built the Interstate Commerce Commission must pass upon the necessity for this

additional facility and consequent expenditure. Moreover, the Missouri Pacific, as shown by its own witnesses, expects to parallel the old main line of the Cotton Belt which is now used as an industrial lead for about 1,000 feet before reaching the Dixie Mill. It will be built directly north of the Cotton Belt right-of-way, where there is a considerable territory susceptible to industrial development, and which will probably be the next territory in that vicinity to be developed industrially. All of respondent's witnesses further testified, in substance, that the purpose of constructing this track is to develop this property and to locate industries to which sidetracks will be built from respondent's proposed industrial lead. The testimony further shows that the Cotton Belt now has a main line lead track adjacent to all of this property from which private industry tracks may be built to any industries that may locate thereon just as well as such tracks could be built from the proposed track of respondent. We do not see how the evidence could make any clearer showing than it does of intention on the part of the Missouri Pacific not only to open up new territory which it does not now serve, but also to invade territory now served adequately by the Cotton Belt both as to service of the Dixie Mill and as to service of the property to the north susceptible of industrial development. There is, of course, no objection to the Missouri Pacific furnishing additional facilities and service for this territory if they are necessary from a public standpoint, but this is a question which, under the Interstate Commerce Act, must be decided by the Interstate

Commerce Commission. Since respondent made no application to the Interstate Commerce Commission, and had required no certificate authorizing it to construct the track, it had no right to construct the track or the part of it to cross petitioner's track.

Under these facts Arkansas failed to follow the controlling decisions of this and other federal courts.

It is respectfully submitted that in this case a writ of certiorari should issue and that the judgment of the Supreme Court of Arkansas should be reversed.

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY,
By HAROLD R. SMALL,
Its Attorney.

ADAIR DYER,
N. F. LAMB,
ARTHUR L. ADAMS,
Of Counsel.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 364.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER.

HAROLD R. SMALL,
Attorney for Petitioner.

ADAIR DYER,
N. F. LAMB,
ARTHUR L. ADAMS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 364.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER.

The propositions in the brief of respondent Missouri Pacific Railroad Company are:

> "The question whether the Missouri Pacific's proposed track is a spur track or an extension was not an issue" (Respondent's Brief, p. 4).
>
> "The right to a crossing cannot be questioned in this action" (Respondent's Brief, p. 8).

The Supreme Court of Arkansas in this case, however, holds the question of whether the proposed track was a spur track or an extension was an issue, its holding being:

> "After a careful reading and analysis of the evidence adduced in the instant case, the Court has concluded that the proposed improvement is a spur within the meaning of paragraph 22 and not an extension of the line of appellee's railroad within the meaning of section 18. The proposed improvement being a spur only, it was unnecessary to obtain a certificate of convenience and necessity for a crossing from the Interstate Commerce Commission before appellee could file its application before the Railroad Commission of Arkansas to fix the place and manner of the crossing.
>
> "The judgment of the Circuit Court is, therefore, affirmed" (Rec., p. 94).

The Supreme Court of Arkansas thus clearly holds that the proposed track was a spur, and not an extension.

The propositions, therefore, of respondent are not in accord with the holding of the Arkansas Supreme Court.

And, strange to say, in view of the foregoing propositions respondent in its brief at page 14 says it had the right "to cross petitioner's railroad with this *spur* track," etc., evidencing its contention the proposed track was a spur track.

The evidence in the record shows the track of respondent that was to cross the track of petitioner was an extension, as an extension is defined by this Court, and as

defined by the United States Court of Appeals for the Eighth Circuit.

No part of the track as a part of an extension could be lawfully constructed without the prior consent of the Interstate Commerce Commission.

The definition of an extension in Texas and Pacific R. R. Co. v. Gulf, Colorado and Santa Fe Railroad Co., 270 U. S. 266 (cited in our original brief at pages 5, 6 and 7), and in Missouri Pacific R. R. v. Chicago, Rock Island and Pacific R. R. Co., 41 Fed. (2d) 190 (U. S. Court of Appeals, 8th Cir., certiorari denied, 282 U. S. 866), defines, it is submitted, the track here in controversy to be an extension. The latter case is referred to in our original brief at pages 8 and 9. The Missouri Pacific in that case proposed to build a track 3,700 feet long in the same City of Little Rock, Arkansas, in a district served by the Rock Island, and the Circuit Court of Appeals decided that before it could build such track extension a certificate from the Interstate Commerce Commission was necessary.

Respondent proposes to duplicate facilities and service to the Dixie Cotton Oil Company in Little Rock, Arkansas, now furnished by petitioner, and the proposal is further to duplicate facilities and service now furnished by petitioner throughout that district, and in a manner so as to bar petitioner from its own territory (Rec., pp. 29-31).

The record shows that the proposed facilities amount to an extension (Rec., pp. 31-32).

The proposed track is to extend respondent's line substantially into territory not theretofore served by respondent, and now served adequately by petitioner (Rec., pp. 9-68, especially pp. 26-27 and 31-32).

It is submitted that the Arkansas Supreme Court erred in failing to follow the controlling federal constructions of an extension, as defined by this Court and as defined by other federal courts.

Respectfully submitted,

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
By HAROLD R. SMALL,
Its Attorney.

ADAIR DYER,
N. F. LAMB,
ARTHUR L. ADAMS,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

ST. LOUIS SOUTHWESTERN RAILWAY CO. ..... *Petitioner,*

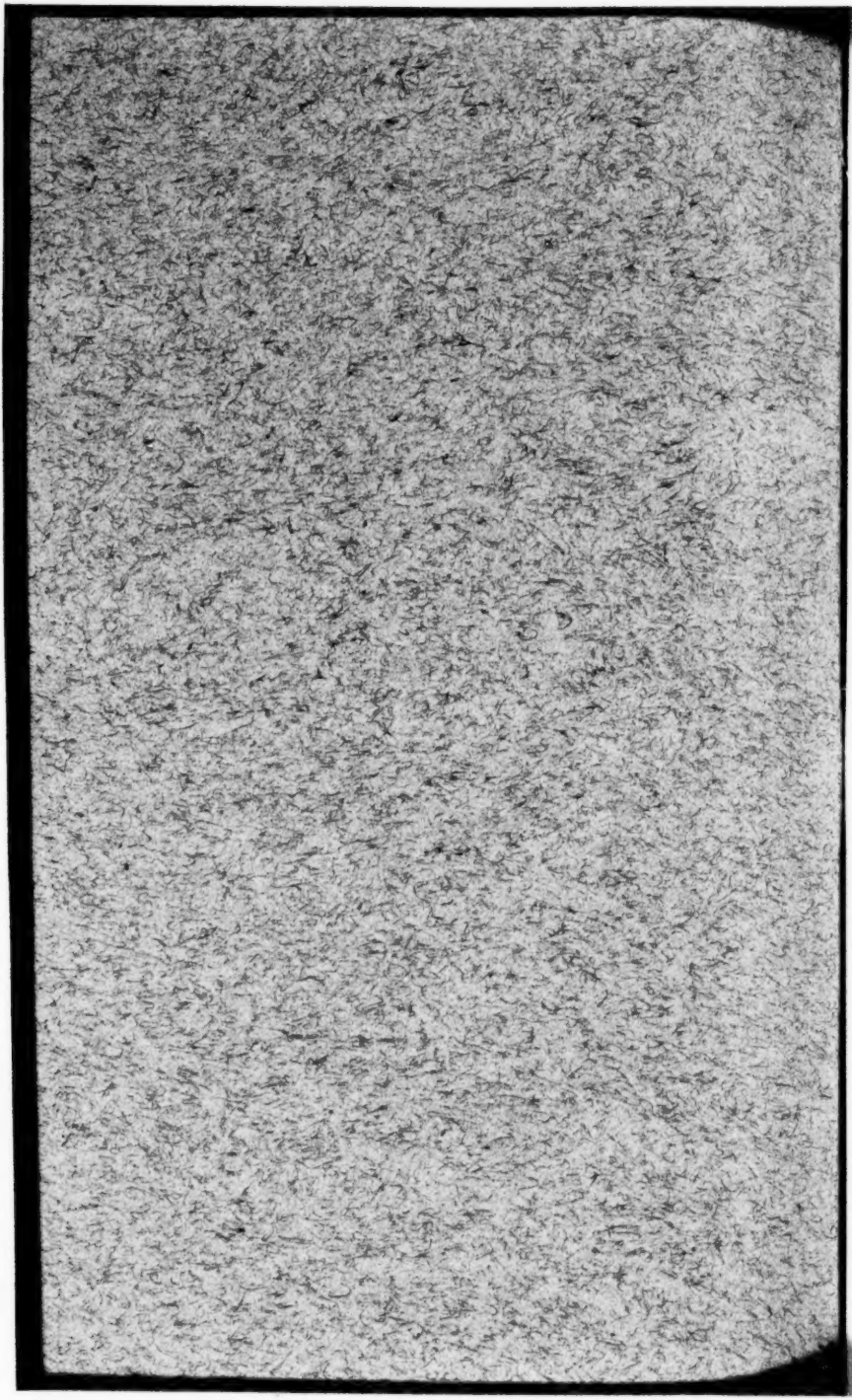
v. No. 364

MISSOURI PACIFIC RAILROAD COMPANY ..... *Respondent.*

MISSOURI PACIFIC RAILROAD COMPANY'S RESPONSE AND BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

ROBERT E. WILEY,

Attorney for Respondent.



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IN THE

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RESPONSE

The Missouri Pacific Railroad Company asks that the brief be taken as its response to the petition for a writ of certiorari.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE QUESTION WHETHER THE MISSOURI PACIFIC'S PROPOSED TRACK IS A SPUR TRACK OR AN EXTENSION WAS NOT IN ISSUE IN THIS PROCEEDING.

The proceeding originated before the Arkansas Railroad Commission. The Arkansas statute provides that any appeal from that commission's order must be heard upon the record made before the commission. That statute after providing for an appeal to the circuit court of Pulaski County and the lodging in said circuit court of a full and complete transcript of all proceedings had before said commission and of all evidence before it, provides as follows:

"The said circuit court shall thereupon review such order upon the record presented as aforesaid in the case and enter its finding and order thereon and cause to be certified forthwith to said commission such order." Section 8417 z3 of Castle's 1927 Supplement to Crawford & Moses' Digest of the Statutes of Arkansas.

Therefore, no issue can be brought into the case that was not involved before the Railroad Commission.

Before that Commission the case was heard and the record made solely on the Missouri Pacific Railroad Company's application for a crossing, no other pleading being filed.

That application of the Missouri Pacific Railroad Company (R. 2-3) was filed pursuant to Section 8417 q1 of 1927 Supplement to Crawford & Moses' Digest of the Statutes of Arkansas, which is also found as Section 1643 of Crawford & Moses' Digest of Statutes of Arkansas.

That application did not ask for authority to construct any track. It invoked the Railroad Commission's regulatory jurisdiction over railroad crossings. It asked the Commission to fix the point and the manner of crossing and the terms of installation, operation, maintenance and protection thereof.

Proceeding under that statute (Section 8417 q1 of 1927 Supplement of Crawford & Moses' Digest of the Statutes of Arkansas) the Missouri Pacific could not have, even if it so wished, asked or obtained authority to construct this spur track. That statute reads as follows:

> "The commission shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expense, use and protection of each crossing of one railroad by another railroad, or street railroad by a railroad, so far as applicable, and to alter or abolish any such crossing, and to require where, in its judgment, it would be practical a separation of grades of any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made, and the proportions in which the expense of the alteration or abolition of such cross-

> ings or the separation of such grades shall be divided between the railroad or street railroad corporations, affected or between such corporations and the state, county, municipality or other public authority in interest. Act April 1, 1919, p. 411, sec. 9; Crawford & Moses' Digest, sec. 1643."

In applying that statute it is a matter of indifference to the Commission whether the crossing is for a track already existing or yet to be constructed.

The St. Louis Southwestern Railway Company filed no pleading, and in stating its case to the Arkansas Railroad Commission its counsel confined himself to the mere statement, "the St. Louis Southwestern Railway Company is opposing the application" (R. 8). The Commission went at once into the testimony. Material testimony in such proceeding is such only as bears on the safety and convenience of the particular point asked for the crossing, whether it should be at grade and the terms and conditions of installation, cost and operation.

The applicant would not go to that hearing prepared to present evidence as to whether the proposed track was a spur track as distinguished from an extension of its line of railroad. The applicant would not be expected to try that question.

And we find that the Missouri Pacific Railroad Company at that hearing did not undertake to develop the facts on its contention that it was not an extension of its line of railroad. What its witnesses said about

the nature, purpose and surroundings of the track was merely incidental and bears only on the propriety of the particular point and manner of the crossing. The St. Louis Southwestern Railway Company's attorney appeared in opposition to the application and on cross-examination of the applicant's witnesses tried to develop facts on the question whether the proposed track was a spur track or an extension of the carrier's line of railroad. He also introduced some witnesses but their testimony was not aimed at that question, being confined substantially to the adequacy of the St. Louis Southwestern Railway Company's service. The facts developed at the hearing on the question of whether the track was a spur track or an extension of the carrier's line of railroad were fragmentory and incidental only.

In other words, that was not the question and could not be which the Arkansas Railroad Commission was being called upon to determine. And this is a case of the petitioner here trying to have this action determined on an issue not heard and determined by the trial tribunal and on testimony not directed to that issue. To do so would not further justice. Had that issue been before the trial tribunal this respondent could and would have adduced evidence supporting its contention that the proposed track is an industrial spur track and not an extension of its line of railroad. It would penalize the respondent and would work unduly in favor of the petitioner to decide this question without this respond-

ent having had an opportunity to present the evidence on that. Respondent could not have been expected to present its evidence on that contention when the question was not at issue.

THE RIGHT TO A CROSSING CAN NOT BE QUESTIONED IN THIS ACTION.

Petitioner can not in this action defeat or test this respondent's right to have a crossing over the petitioner's railroad. This is under the rule well settled in Arkansas that the only way to raise an issue on the right of a railroad to condemn property for its use, including a crossing of another railroad, is by a suit for injunction in a court of equity.

Neimeyer v. *Little Rock Junction Ry. Co.*, 43 Ark. 111.

Mountain Park Terminal Co. v. *Field*, 76 Ark. 239.

St. L., I. M. & S. Ry. Co. v. *Faisst*, 99 Ark. 61.

St. L., I. M. & S. Ry. Co. v. *F. S. & V. B. Ry. Co.*, 104 Ark. 344, 350.

In *Neimeyer* v. *Little Rock Junction Ry., supra,* the court said the proceeding by a railroad company under our statute to condemn a right-of-way is a special one and "no provision is made for any issue upon the RIGHT to condemn."

The other cases cited are to the same effect and further hold that the landowner is not without remedy against an illegal taking "and that the court of equity

will mould adequate remedy by injunction in order to give relief to the landowner'' (99 Ark., page 63).

The last-cited case, *St. L., I. M. & S. Ry. Co.* v. *F. S. & V. B. Co.*, applies the rule to an action by one railroad to condemn a crossing over another railroad (104 Ark. 350). The court said:

> ''The doctrine established by our previous decisions is that a railroad corporation is, by its charter, clothed with the power of eminent domain to the extent of its necessities, and that this gives it a *prima facie* right to condemn, which can not be questioned in a statutory action at law brought in the exercise of its power of eminent domain. *Neimeyer* v. *Little Rock Junction Ry. Co.*, 43 Ark. 111, settles that question, we think, beyond dispute, and the only remedy is by injunction granted by a court of equity or by transfer to such court for equitable relief for the purpose of ascertaining the right of a corporation to exercise the right of eminent domain. That is the same as an independent suit in equity for an injunction. This applies to a suit by one railroad to condemn for the purpose of crossing the line of another railroad. The statute gives the court in those cases only the right to ascertain 'the point and manner of such crossing,' in addition to ascertaining the amount of compensation to be paid. The Constitution of this State (art. 17, sec. 1) declares that 'every railroad company shall have the right with its road to intersect, connect with, or cross any other road;' and whenever that right is asserted in an action at law to condemn, it cannot be questioned in that forum. The only remedy is in a court of equity, to which the cause may be transferred on proper showing of facts sufficient to justify equitable re-

lief, as indicated in the decision referred to" (104 Ark. 350, 351).

Thus the statutory proceeding to enforce a crossing (equally with any other right-of-way) is only to ascertain (1) the point of crossing, (2) the manner of crossing and (3) the compensation for crossing and in such proceeding the right to have the crossing can not be denied.

The foregoing cases involved proceedings in the circuit court and under Section 8490, C. & M. Digest of Statutes of Arkansas, which provides that (1) the amount of compensation, (2) the point, and (3) manner of crossing shall be determined by a court of competent jurisdiction in the same manner as provided for the ascertainment of damages for right-of-way; which is by a suit in the circuit court. But the principle and the rule must be the same in any other procedure substituted by statute.

In other words, if the Legislature has now substituted for the above-named suit in the circuit court a proceeding before the Railroad Commission to fix the point and manner of crossing, that substitution does not affect the application of the rule of the foregoing authorities. It still remains true that the right to the crossing cannot be denied except upon an issue made in a court of equity which would entitle to injunction.

This brings us to the question in what tribunal is the jurisdiction to enforce or condemn the crossing. As we have seen in the act of 1883 (Sec. 8490, C. & M.

Digest), it says the same (that is the (1) compensation, the (2) point, and the (3) manner of crossing) shall be ascertained and determined by a court of competent jurisdiction, in the same manner as provided for the ascertainment of damages for right-of-way for railroads, which puts it in the circuit court.

But in 1919 the Legislature enacted a statute in part as follows (now Section 1643, C. & M. Digest), which is the statute under which Missouri Pacific Railroad Company brought the action now at bar:

> "Crossings. The Commission shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expenses, use and protection of each crossing of one railroad by another railroad, or street railroad by a railroad, so far as applicable and to alter or abolish any such crossing and to require where, in its judgment, it would be practical, a separation of grades of any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made, and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations, affected or between such corporations and the State, county, municipality or other public authority in interest."

But the jurisdiction thus given the Railroad Commission doesn't reach to denying a crossing. A reasonable regulation of the exercise of the right of cross-

ing is all that is intended by the statute. And if it intended to give jurisdiction to prohibit or deny a crossing it would be unconstitutional. Because the Arkansas Constitution guarantees the right of crossing by one railroad over another.

Arkansas Constitution of 1874, Sec. 1 of Art. XVII, provides: "Every railroad company shall have the right with its road to intersect, cross and connect with any other road."

The Arkansas Supreme Court has held that the term "railroad" as used in that provision "includes all side tracks necessary or convenient for the company's business," and that a private industry track was so included.

> *Conway Oil & Ice Co.* v. *Gibson Oil Co.*, 175 Ark. 905.

Enforcing that right, the Legislature has enacted that a railroad corporation shall have the following among other powers:

> "Fifth: To construct their road upon or across any stream of water, watercourse, road, highway, railroad or canal which the route of the road shall intersect." (C. & M. Dig., Sec. 8450.)

It is also provided by the statute that:

> "Right to cross and intersect. Every railroad corporation created and organized under the laws of this State, or created and organized under the laws of any other State or the United States, and operating in this State, shall have the power to cross, intersect, join or unite its railroad with

any other railroad now constructed or that may hereafter be constructed at any point on its route and upon the grounds and right-of-way of such other railroad company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the object of its construction. And every railroad company whose railroad is or shall be crossed, joined or intersected by any new railroad shall unite with the owners and corporation of such new railroad in forming such crossing, intersection and connection, and shall grant to such railroads so crossing, intersecting or uniting all the necessary facilities for that purpose as aforesaid."

Section 8489, C. & M. Digest of the Statutes of Arkansas:

"Compensation. If the two corporations cannot agree upon the amount of compensation to be made for the purpose set forth in the foregoing section, or the points or manner of such crossing, junctions or intersections, the same shall be ascertained and determined by a court of competent jurisdiction in the same manner as provided for the ascertainment of damages for right-of-way for railroads."

Section 8490, C. & M. Digest of the Statutes of Arkansas.

Of this constitutional right of crossing, the Arkansas Supreme Court has said:

"Every railroad corporation takes its right-of-way subject to the right of the public to have constructed other highways across it when necessary in the same manner as it is subject to future

taxation or to reasonable regulations of the mode of using its property," and

> "It is true that the crossing imposes a new burden but it is one to which it is subjected by the nature of the case and the terms of its charter."

Cairo & Trumann Southern R. R. Co. v. *Ark. Short Line*, 172 Ark. 317, 322.

The Railroad Commission, substituted for the circuit court to determine the point and manner of crossing is subject to the same limitation as the circuit court with reference to having no power to determine any issue on the right to cross. If that right is to be questioned it must be in a suit for injunction in the chancery court as held uniformly by the foregoing authorities with reference to the circuit court.

So respondent, having the right to cross petitioner's railroad with this spur track (at least until the contrary is shown to the satisfaction of a court of equity), applied to the Arkansas Railroad Commission pursuant to Section 1643 of C. & M. Digest to fix the point and manner of its crossing. We call the court's attention that the respondent's petition to the Railroad Commission did not ask for authority to construct the track but merely that it have a crossing at the particular "point named and at grade and at petitioner's expense of construction and in accordance with the terms of installation, operation, maintenance and protection of such crossing as may be fixed by your honorable body" (R. 3). The respondent's petition to the Railroad Commission does not submit any issue as to

respondent's right to construct the spur track nor as to its right to have a crossing over petitioner's railroad track. In line with the foregoing constitutional and statutory provisions and the decisions of the Arkansas courts, respondent did not conceive that the Railroad Commission had jurisdiction to pass on its right to build this spur track, nor to pass on its right to have a crossing over petitioner's railroad track other than to fix the point and manner thereof. The petition to the Commission therefore was confined to describing the location and character of the spur track which it intended to build and the track which it desired to cross and to stating the point and manner it desired and then prayed that it have said crossing at such point named and at grade and at applicant's expense and in accordance with the terms of installation, maintenance, operation and protection to be fixed by the Commission (R. 3).

Of course the petitioner is not without remedy, but it must pursue that remedy by the procedure fixed by our statutes and decisions, which is by suit for injunction in a court of equity. And it has pursued that remedy and has now pending in the United States District Court for the Western Division of the Eastern District of Arkansas its suit in equity against respondent to enjoin it from constructing said spur track on the grounds argued by petitioner in its brief in this case. In that suit will be settled the issues which it submits

here as a reason why respondent's right to cross petitioner's railroad track should be wholly denied.

Dated at Little Rock, Arkansas, this 4th day of October, 1932.

ROBERT E. WILEY,

Attorney for Respondent.

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Supreme Court of the United States

OCTOBER TERM

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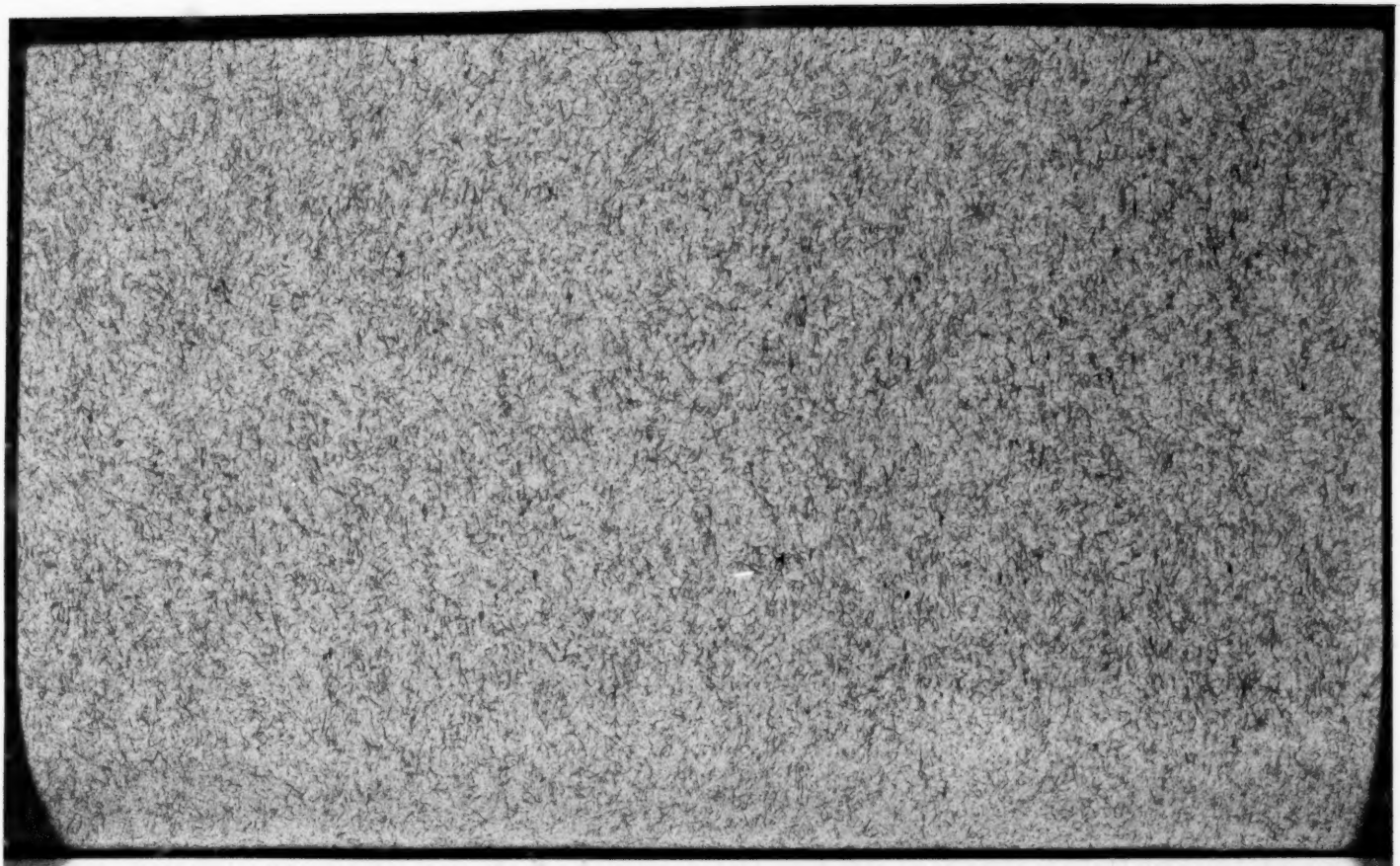
Missouri Pacific Railroad Company, *Respondent*.

BRIEF FOR MISSOURI PACIFIC RAILROAD COMPANY

THE QUESTION WHETHER THE MISSOURI PACIFIC'S PROPOSED TRACK IS A SPUR TRACK OR AN EXTENSION WAS NOT IN ISSUE IN THIS PROCEEDING

Edward J. White,
Robert E. Wilby,
Attorneys for Respondent.



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BRIEF FOR MISSOURI PACIFIC RAILROAD COMPANY

THE QUESTION WHETHER THE MISSOURI PACIFIC'S PROPOSED TRACK IS A SPUR TRACK OR AN EXTENSION WAS NOT IN ISSUE IN THIS PROCEEDING

Petitioner in its petition for certiorari says:

> "The question involved is whether the proposed track of the Missouri Pacific is a spur track or an extension."

We have never conceived that to be the question involved in this procedure.

In its "Summary of Argument" petitioner, assuming the track to be an extension, argues that "the

approval of the Interstate Commerce Commission was required before respondent was authorized to construct, maintain or operate the proposed track extension or to secure authority from the Arkansas Railroad Commission with respect to a crossing of such proposed track over petitioner's tracks."

But in passing on this respondent's petition it would be a matter of indifference to the Arkansas Railroad Commission whether the crossing prayed was for a track already existing or yet to be constructed. Respondent's petition merely invoked the Arkansas Commission's regulatory powers over crossing by one railroad of another. The question of the right to construct a track was not before the Arkansas Commission. The character of the track for which crossing was asked was not before that Commission. Without applying to the Arkansas Commission and without any kind of action by that commission this respondent might have constructed its tracks on both sides of the petitioner's railroad and then have asked that Commission just what it did ask in this case. When it is made clear that in exercising its jurisdiction in this case it was wholly a matter of indifference to the Commission whether the crossing was for a track already existing or yet to be constructed it becomes plain that the petitioner is mistaken in saying that "the question involved is whether the proposed track is a spur track or an extension."

If in passing on this respondent's petition the Arkansas Railroad Commission would have the same

duty regardless of whether the crossing was for a track already existing or one yet to be constructed then the character of the track is not material to that Commission's decision. That was the situation in our case. This respondent asked the Arkansas Commission to fix the point and manner of crossing for a track over a certain described track of the St. Louis, Southwestern Railway Company. The case was heard and the record made solely on the Missouri Pacific Railroad Company's application for a crossing, no other pleading being filed. The St. Louis, Southwestern Railway Company filed no response to that pleading before the Arkansas Commission. Its counsel at the hearing responded verbally: "The St. Louis, Southwestern Railway Company is opposing the application" (R. 8).

And suppose the court reverses this judgment and then this respondent applies to the Interstate Commerce Commission and obtains a certificate of convenience and necessity (it appears the evidence in this record would justify such a certificate) then this proceeding would have to be gone through with again. The Missouri Pacific Railroad Company would have to again apply to the Arkansas Railroad Commission to fix the point and manner of the crossing. It would seem proper and convenient for the court to hold that the question of whether this track was a spur or an extension was not in issue and leave that question to be settled by litigation in the court where the pro-

cedure is adapted to developing the evidence and more certainly ascertaining the rights of the parties. If the St. Louis, Southwestern Railway Company is correct that this is an extension which cannot be built until a certificate is granted by the Interstate Commerce Commission then the Missouri Pacific can never construct the track without that certificate (in the face of the opposition of the St. Louis, Southwestern) regardless of the Arkansas Railroad Commission's order fixing the point and manner of crossing. The latter is a preliminary to constructing the track and the right to construct a track must be obtained in the lawful way, whatever that may be, before it is constructed. But it is submitted that it would be in order and convenient that the benefit of the proceeding already had before the Arkansas Commission in performing a duty which devolves on it regardless of the character of the track should be preserved and the cost and trouble of repeating it saved.

The proceeding now at bar did not start in any court but originated before the Arkansas Railroad Commission. The Arkansas statute provides that any appeal from that commission's order must be heard upon the record made before the commission. That statute after providing for an appeal to the circuit court of Pulaski County and the lodging in said circuit court of a full and complete transcript of all proceedings had before said commission and of all evidence before it, provides as follows:

"The said circuit court shall thereupon review such order upon the record presented as aforesaid in the case and enter its finding and order thereon and cause to be certified forthwith to said commission such order." Section 8417 z3 of Castle's 1927 Supplement to Crawford & Moses' Digest of the Statutes of Arkansas.

Therefore, no issue can be brought into the case that was not before the Railroad Commission.

Before that Commission the case was heard and the record made solely on the Missouri Pacific Railroad Company's application for a crossing, no other pleading being filed.

That application of the Missouri Pacific Railroad Company (R. 2-3) was filed pursuant to Section 8417 q1 of 1927 Supplement to Crawford & Moses' Digest of the Statutes of Arkansas, which is also found as Section 1643 of Crawford & Moses' Digest of Statutes of Arkansas.

That application did not ask for authority to construct any track. It invoked the Railroad Commission's regulatory jurisdiction over railroad crossings. It asked the Commission to fix the point and the manner of crossing and the terms of installation, operation, maintenance and protection thereof.

Proceeding under that statute (Section 8417 q1 of 1927 Supplement of Crawford & Moses' Digest of the Statutes of Arkansas) the Missouri Pacific could not

have, even if it so wished, asked or obtained authority to construct this spur track. That statute reads as follows:

> "The commission shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expense, use and protection of each crossing of one railroad by another railroad, or street railroad by a railroad, so far as applicable, and to alter or abolish any such crossing, and to require where, in its judgment, it would be practical a separation of grades of any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made, and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations, affected or between such corporations and the state, county, municipality or other public authority in interest. Act April 1, 1919, p. 411, sec. 9; Crawford & Moses' Digest, sec. 1643."

Material testimony in such proceeding is such only as bears on the safety and convenience of the particular point asked for the crossing, whether it should be at grade and the terms and conditions of installation, cost and operation.

The applicant would not go to that hearing prepared to present evidence as to whether the proposed track was a spur track as distinguished from an extension of its line of railroad. The applicant would not be expected to try that question.

And we find that the Missouri Pacific Railroad Company at that hearing did not undertake to develop the facts on its contention that it was not an extension of its line of railroad. What its witnesses said about the nature, purpose and surroundings of the track was merely incidental and bears only on the propriety of the particular point and manner of the crossing. The St. Louis Southwestern Railway Company's attorney appeared in opposition to the application and on cross-examination of the applicant's witnesses tried to develop facts on the question whether the proposed track was a spur track or an extension of the carrier's line of railroad. He also introduced some witnesses but their testimony was not aimed at that question, being confined substantially to the adequacy of the St. Louis Southwestern Railway Company's service. The facts developed at the hearing on the question of whether the track was a spur track or an extension of the carrier's line of railroad were fragmentory and incidental only.

In other words, that was not the question and could not be which the Arkansas Railroad Commission was being called upon to determine. And this is a case of the petitioner here trying to have this action determined on an issue not heard and determined by the trial tribunal and on testimony not directed to that issue. To do so would not further justice. Had that issue been before the trial tribunal this respondent could and would have adduced evidence supporting its contention that the proposed track is an industrial spur track and not

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THE RIGHT TO A CROSSING CAN NOT BE QUESTIONED IN THIS ACTION.

Petitioner can not in this action defeat or test this respondent's right to have a crossing over the petitioner's railroad. This is under the rule well settled in Arkansas that the only way to raise an issue on the right of a railroad to condemn property for its use, including a crossing of another railroad, is by a suit for injunction in a court of equity.

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The other cases cited are to the same effect and further hold that the landowner is not without remedy against an illegal taking "and that the court of equity will mould adequate remedy by injunction in order to give relief to the landowner" (99 Ark., page 63).

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> "The doctrine established by our previous decisions is that a railroad corporation is, by its charter, clothed with the power of eminent domain to the extent of its necessities, and that this gives it a *prima facie* right to condemn, which can not be questioned in a statutory action at law brought in the exercise of its power of eminent domain. *Neimeyer* v. *Little Rock Junction Ry. Co.*, 43 Ark. 111, settles that question, we think, beyond dispute, and the only remedy is by injunction granted by a court of equity or by transfer to such court for equitable relief for the purpose of ascertaining the right of a corporation to exercise the right of eminent domain. That is the same as an independent suit in equity for an injunction. This applies to a suit by one railroad to condemn for the purpose of crossing the line of another railroad. The statute gives the court in those cases only the right to ascertain 'the point and manner of such crossing,' in addition to ascertaining the amount of compensation to be paid. The Constitution of this State (art. 17, sec. 1) declares that 'every railroad company shall have the right with its road to intersect, connect with, or cross any other road;' and whenever that right is asserted in an action at law to condemn, it cannot be questioned in that

forum. The only remedy is in a court of equity, to which the cause may be transferred on proper showing of facts sufficient to justify equitable relief, as indicated in the decision referred to" (104 Ark. 350, 351).

Thus the statutory proceeding to enforce a crossing (equally with any other right-of-way) is only to ascertain (1) the point of crossing (2) the manner of crossing and (3) the compensation for crossing and in such proceeding the right to have the crossing can not be denied.

The foregoing cases involved proceedings in the circuit court and under Section 8490, C. & M. Digest of Statutes of Arkansas, which provides that (1) the amount of compensation, (2) the point, and (3) manner of crossing shall be determined by a court of competent jurisdiction in the same manner as provided for the ascertainment of damages for right-of-way; which is by a suit in the circuit court. But the principle and the rule must be the same in any other procedure substituted by statute.

In other words, if the Legislature has now substituted for the above-named suit in the circuit court a proceeding before the Railroad Commission to fix the point and manner of crossing, that substitution does not affect the application of the rule of the foregoing authorities. It still remains true that the right to the crossing cannot be denied except upon an issue made in a court of equity which would entitle to injunction.

This brings us to the question in what tribunal is the jurisdiction to enforce or condemn the crossing. As we have seen in the act of 1883 (Sec. 8490, C. & M. Digest), it says the same (that is the (1) compensation, the (2) point, and the (3) manner of crossing) shall be ascertained and determined by a court of competent jurisdiction, in the same manner as provided for the ascertainment of damages for right-of-way for railroads, which puts it in the circuit court.

But in 1919 the Legislature enacted a statute in part as follows (now Section 1643, C. & M. Digest), which is the statute under which Missouri Pacific Railroad Company brought the action now at bar:

> "Crossings. The Commission shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expenses, use and protection of each crossing of one railroad by another railroad, or street railroad by a railroad, so far as applicable and to alter or abolish any such crossing and to require where, in its judgment, it would be practical, a separation of grades of any such crossing heretofore or hereafter established, and to prescribe the terms upon which such separation shall be made, and the proportions in which the expense of the alteration or abolition of such crossings or the separation of such grades shall be divided between the railroad or street railroad corporations, affected or between such corporations and the State, county, municipality or other public authority in interest."

But the jurisdiction thus given the Railroad Commission doesn't reach to denying a crossing. A rea-

sonable regulation of the exercise of the right of crossing is all that is intended by the statute. And if it intended to give jurisdiction to prohibit or deny a crossing it would be unconstitutional. Because the Arkansas Constitution guarantees the right of crossing by one railroad over another.

Arkansas Constitution of 1874, Sec. 1 of Art. XVII, provides: "Every railroad company shall have the right with its road to intersect, cross and connect with any other road."

The Arkansas Supreme Court has held that the term "railroad" as used in that provision "includes all side tracks necessary or convenient for the company's business," and that a private industry track was so included.

> *Conway Oil & Ice Co.* v. *Gibson Oil Co.*, 175 Ark. 905.

Enforcing that right, the Legislature has enacted that a railroad corporation shall have the following among other powers:

> "Fifth: To construct their road upon or across any stream of water, watercourse, road, highway, railroad or canal which the route of the road shall intersect." (C. & M. Dig., Sec. 8450.)

It is also provided by the statute that:

> "Right to cross and intersect. Every railroad corporation created and organized under the laws of this State, or created and organized under the laws of any other State or the United States, and operating in this State, shall have the power

to cross, intersect, join or unite its railroad with any other railroad now constructed or that may hereafter be constructed at any point on its route and upon the grounds and right-of-way of such other railroad company, with the necessary turnouts, sidings and switches and other conveniences in furtherance of the object of its construction. And every railroad company whose railroad is or shall be crossed, joined or intersected by any new railroad shall unite with the owners and corporation of such new railroad in forming such crossing, intersection and connection, and shall grant to such railroads so crossing, intersecting or uniting all the necessary facilities for that purpose as aforesaid."

Section 8489, C. & M. Digest of the Statutes of Arkansas:

"Compensation. If the two corporations cannot agree upon the amount of compensation to be made for the purpose set forth in the foregoing section, or the points or manner of such crossing, junctions or intersections, the same shall be ascertained and determined by a court of competent jurisdiction in the same manner as provided for the ascertainment of damages for right-of-way for railroads."

Section 8490, C. & M. Digest of the Statutes of Arkansas.

Of this constitutional right of crossing, the Arkansas Supreme Court has said:

"Every railroad corporation takes its right-of-way subject to the right of the public to have constructed other highways across it when necessary in the same manner as it is subject to future

taxation or to reasonable regulations of the mode of using its property," and

"It is true that the crossing imposes a new burden but it is one to which it is subjected by the nature of the case and the terms of its charter."

Cairo & Trumann Southern R. R. Co. v. *Ark. Short Line*, 172 Ark. 317, 322.

The Railroad Commission, substituted for the circuit court to determine the point and manner of crossing is subject to the same limitation as the circuit court with reference to having no power to determine any issue on the right to cross. If that right is to be questioned it must be in a suit for injunction in the chancery court as held uniformly by the foregoing authorities with reference to the circuit court.

So respondent, having the right to cross petitioner's railroad with this spur track (at least until the contrary is shown to the satisfaction of a court of equity), applied to the Arkansas Railroad Commission pursuant to Section 1643 of C. & M. Digest to fix the point and manner of its crossing. We call the court's attention that the respondent's petition to the Railroad Commission did not ask for authority to construct the track but merely that it have a crossing at the particular "point named and at grade and at petitioner's expense of construction and in accordance with the terms of installation, operation, maintenance and protection of such crossing as may be fixed by your honorable body" (R. 3). The respondent's petition to the Railroad Commission does not submit any issue as to

respondent's right to construct the spur track nor as to its right to have a crossing over petitioner's railroad track. In line with the foregoing constitutional and statutory provisions and the decisions of the Arkansas courts, respondent did not conceive that the Railroad Commission had jurisdiction to pass on its right to build this spur track, nor to pass on its right to have a crossing over petitioner's railroad track other than to fix the point and manner thereof. The petition to the Commission therefore was confined to describing the location and character of the spur track which it intended to build and the track which it desired to cross and to stating the point and manner it desired and then prayed that it have said crossing at such point named and at grade and at applicant's expense and in accordance with the terms of installation, maintenance, operation and protection to be fixed by the Commission (R. 3).

Of course the petitioner is not without remedy, but it must pursue that remedy by the procedure fixed by our statutes and decisions, which is by suit for injunction in a court of equity. And it has pursued that remedy and has now pending in the United States District Court for the Western Division of the Eastern District of Arkansas its suit in equity against respondent to enjoin it from constructing said spur track on the grounds argued by petitioner in its brief in this case. In that suit will be settled the issues which it submits here as a reason why respondent's right to cross petitioner's railroad track should be wholly denied.

The tribunal where this suit was begun is wholly without jurisdiction of that question, which is sufficient reason why that question is not before this court and cannot be in this action determined.

Additional reason why that question is not in this case is because it involves the absolute denial of appellee's right to cross. It presents an issue of the right of crossing which, under the settled rule of the foregoing authorities, can only be made in a court of equity. And every case relied on by the petitioner on this question is a suit in equity for injunction. Petitioner has its remedy in the courts of equity and may pursue it whenever it thinks wise, and, as already stated, is now pursuing it but cannot inject that issue in this case. But under the Arkansas Constitution, statutes and authorities foregoing cited the Railroad Commission was without power to deny the respondent's right to cross. Its jurisdiction reached only to fixing the point and manner of crossing.

PETITIONER MADE A JUDICIAL ADMISSION IN OPEN HEARING WHICH, REGARDLESS OF OTHER CONSIDERATIONS, JUSTIFIES THE JUDGMENT APPEALED FROM

At the trial before the Arkansas Railroad Commission, near the close of the testimony, counsel appearing for petitioner made the following formal statement:

> "By Mr. Kiskaddon: Mr. Rockenback testified the Argenta proposition is out, and that con-

tract does not concern us. The proposition now open is we will give rights over 400 ft. into the Dixie Mill if they will give us right over some tracks into the Norton-Wheeler Stave Company at Pine Bluff. That is all that is open. That proposition is open right now."

The testimony was then closed and the Arkansas Commission took the matter under advisement. While it was under advisement this respondent formally accepted the aforesaid proposition made by petitioner's counsel by communicating its acceptance to petitioner's proper officials and thereafter by filing before the Arkansas Commission its petition for rehearing setting out the offer and this respondent's acceptance of it and praying that the Commission enforce it by order made in the case (R. 78-80).

To understand the bearing of that proposition, it is necessary to go into the facts in some detail.

The Dixie Cotton Oil Company operated a cotton oil mill in North Little Rock. It was served from the St. Louis-Southwestern Railway Company and the Chicago, Rock Island & Pacific Railway Company by tracks into its plant, but sixty per cent of its total business moved over the railroad of this respondent (R. 33), being switched from the Dixie plant by the St. Louis-Southwestern to an interchange track, where this respondent picked it up. This respondent had a contract with the St. Louis-Southwestern for joint use of the latter's lead track to within 400 feet of the Dixie plant. To enable it to carry this traffic directly

to and from the Dixie plant, the respondent needed only the right to operate 400 feet from there over the St. Louis-Southwestern track. There was no physical obstacle or inconvenience, and only petitioner's consent was needed to accomplish such a handling. It is in evidence that for four years the Dixie plant had sought direct connection with the Missouri Pacific (R. 34).

In February, 1930, the Dixie people renewed their effort with carriers to accomplish direct connection with the Missouri Pacific tracks. Mr. Rice, the principal owner of the Dixie plant, originated the negotiations and on February 27, 1930, wrote to President Gorman, of the Rock Island, and President Upthegrove, of the St. Louis-Southwestern, stating:

> "The movement of cottonseed into our Dixie plant at Little Rock off the Missouri Pacific has increased to such an extent that we think it is necessary to make arrangements for that company to have the use of the track serving our plant, in order to expedite the switching service. Our trackage contract with your company runs out on August, 1930, and this is to notify you of our desire for a conference to arrange for new trackage arrangements on use of tracks by the Missouri Pacific."

Mr. H. R. Wilson's testimony as to the further course of these negotiations is undisputed and is as follows:

That letter resulted in a conference on April 30, 1930, in Memphis between Mr. Rice of the Dixie Mill, Mr. Rockenback of the St. Louis-Southwestern, Mr.

Stewart, Industrial Commissioner of the Rock Island, Mr. Brooks and Mr. Wilson of the Missouri Pacific, at which Mr. Rice stated that the Dixie wanted the Missouri Pacific service and his reasons. Whereupon, Mr. Stewart, of the Rock Island, agreed for the Missouri Pacific to serve the plant by having joint use of such tracks as belonged to the Rock Island into the plant. Mr. Rockenback, of the St. Louis-Southwestern (commonly called the Cotton Belt), stated there were features he could not pass on and which he would have to submit to his management, and also he advised us that they were not in position to allow us access to the plant except under certain terms and conditions, which we felt were so unreasonable that we could not meet them. So we were unable to agree with the Cotton Belt (R. 35).

"There is a contract existing between the Rock Island, Cotton Belt and Dixie Cotton Oil Mill involving tracks owned by each of the three parties inside the Dixie plant enclosure. That contract is a continuing one, but may be canceled upon thirty days' notice. When we were not able to make satisfactory arrangements with the Cotton Belt for serving the plant, Mr. Rice served notice on the Cotton Belt of his intention to cancel contract on its anniversary, August 30, 1930, and said to us that would settle the matter so far as the Missouri Pacific's access to the plant's tracks were concerned. He told the Cotton Belt he would be very glad to see them continue in the plant, but as they had

not been able to get together that he felt the Missouri Pacific was more necessary to him than the Cotton Belt—that if he had to choose between one or the other he would have to take the Missouri Pacific'' (R. 36).

The Missouri Pacific then further negotiated with the Cotton Belt with the view to serving the plant by joint use of the present Cotton Belt switch. The former old main track of the Cotton Belt is now used by it as an industrial lead. From it a Cotton Belt switch runs to the Dixie plant. There is already in force a contract between the Cotton Belt and the Missouri Pacific for the use by the Missouri Pacific of that Cotton Belt industrial lead and connections to a point only about 400 feet from the Dixie plant. The extension by agreement of this contract, joint use for 400 feet further would enable the Missouri Pacific to serve the Dixie plant directly without building additional trackage (R. 34). It was the effort of the Missouri Pacific in the negotiations to obtain this extension.

At that time the negotiations came to naught solely because the St. Louis-Southwestern attached as conditions to its granting direct joint use of the 400 feet of its track into the Dixie plant concessions from this respondent which the latter found so unreasonable and burdensome as to be impossible of acceptance.

It is necessary to explain what those concessions were in order to show the bearing of the proposition of petitioner's counsel above referred to. From the

testimony, beginning at page 65 of the record, the following facts appear:

About 1924 the Missouri Pacific bought the Argenta Terminal Railway, which was an industrial line about three quarters of a mile long, built in 1916 by the Twin City Development Company, connected with the Rock Island tracks and crossing the Cotton Belt's old main and from which spurs lead to various industries. At the time of this purchase by the Missouri Pacific, the Argenta Terminal had a long outstanding contract (unknown to the Missouri Pacific) with the Cotton Belt which prohibited the Argenta Terminal from extending any new spurs off this track without the Cotton Belt's consent. When the Missouri Pacific was informed of that contract it declined to be bound by it, claiming that it did not know of it and did not assume it, and, as vendee of the Argenta Terminal, was not legally bound by it. Of course, that restriction was a great burden and tremendously restricted the use and benefits which the Missouri Pacific thought it was getting when it purchased the Argenta Terminal. It was advised that it was not bound by the contract, not having known of or assumed it. Naturally, it was unwilling to waive or surrender its contention. The Cotton Belt claimed the Missouri Pacific was bound by the contract. It was a question which could readily and with little expense be submitted to the courts. And, of course, the Missouri Pacific recognized that it probably would have to meet the Cotton Belt in litigation on it sooner or later. But such a vital right depended

on its contention that it could not afford to surrender or waive it without taking the court's judgment on it (the question has since then been decided in favor of Missouri Pacific's contention by the Pulaski Chancery Court, Little Rock, Arkansas).

In proposing the terms on which it would let the Missouri Pacific use the 400 feet additional Cotton Belt track into the Dixie plant, the Cotton Belt, after naming that the Missouri Pacific should extend to the Cotton Belt the use of about 1,000 feet or more of the Missouri Pacific track into certain industries at Pine Bluff, further demanded that the Missouri Pacific surrender and waive its contention that it was not bound by the Argenta Terminal contract aforesaid and that it acknowledge that it was bound (the court will understand that this Argenta Terminal track and spurs do not touch the Dixie plant or have any bearing on the Missouri Pacific reaching to that plant, but is a collateral matter).

The Missouri Pacific, although it considered that the access over its tracks at Pine Bluff named by the Cotton Belt was a greater concession than its use of the 400 feet of the Cotton Belt's track into the Dixie plant, yet was willing to grant that concession. And, except for the Cotton Belt's impossible demand that the Missouri Pacific acknowledge itself bound by the old Argenta Terminal agreement, the two roads could probably have gotten together on an agreement for the use of the Cotton Belt's 400-feet switch into the Dixie plant.

MR. H. R. WILSON further testified:

"When we purchased the Argenta Terminal Railroad, we purchased the physical properties of the railroad. A contract was presented to us as existing between the Argenta Terminal Railroad and the Cotton Belt, under which the Cotton Belt was given the right to use the road, I think, until sometime in May, 1931. That was the contract that was represented to us by the owners of the Argenta Terminal Railroad as being the contract in existence. We had a deed to the property, subject to that contract, and the contract was recorded with the deed. The first knowledge we ever had that there was any claim there was a previous contract in existence was this letter from Mr. Rockenback. If we had agreed to that, it would have meant we would have to give up 50% use of a railroad we paid a great deal of money for and on which we have no rights beyond 1931" (R. 65).

We objected to accepting his proposition "because it attempted to settle this dispute. In other words, as we understood his proposition, it demanded whatever legal right we may have to contest that contract would have to be waived aside as a part of this trade" (R. 66).

At the conclusion of Mr. Wilson's testimony showing the foregoing facts, Mr. Kiskaddon, petitioner's counsel, in open hearing, made the judicial admission or proposition first herein set out.

By it the objectionable condition standing in the way of respondent's and petitioner's agreement for the use of the 400 feet of track into the Dixie plant was withdrawn. Thereupon, as already stated, the authorized general manager of the respondent advised the authorized officer of the petitioner that Mr. Kiskaddon's proposition in open hearing was acceptable.

Petitioner has contended that the statement of its counsel, Mr. Kiskaddon, has no bearing because it was an offer to compromise. That is not the right view. It was a judicial admission formally made, and when it was shown that this respondent had formally accepted the offer and prayed the Commission to enforce it, it was error for the Commission to refuse to hear testimony and to deny the petition for rehearing. The Commission is a regulatory body and can mould its remedies. It should have enforced consummation of the petitioner's formal judicial offer or should have granted respondent's petition. And for this reason, regardless of other considerations, the circuit court of Pulaski County, on appeal, and the Supreme Court of Arkansas were right in adjudging that respondent's petition should be granted.

THE PROPOSED TRACK IS NOT AN EXTENSION OF RESPONDENT'S LINE OF RAILROAD BUT IS A SPUR OR INDUSTRIAL TRACK

While the evidence on the point in the record is meager, for the reasons already stated that this point

was not in issue, we submit it still is sufficient to show that the proposed track is not an extension of petitioner's line of railroad within the meaning of paragraph 18 of Section 1 of the Interstate Commerce Act, but is a spur, industrial switching or sidetrack located wholly within one State within the meaning of the exception in paragraph 22 of Section 1 of that act.

Had this question been in issue, it could and would have been shown that movements over the proposed track would be solely switching movements. No road trains would be run over the track; all movements would be under yard rules; no operations on them under train orders from the dispatcher's office; no additional freight charge for transporting the freight over the track; and no change in rates or other tariff charges different from those for transporting freight destined to or from the city of North Little Rock. That in respondent's reports made according to law to the Interstate Commerce Commission, on which all regulatory action of that Commission toward respondent as a common carrier is based, this track would be classified as a sidetrack or industrial track and not as main line or branch.

It is shown that the track is physically a spur track, being connected with respondent's railroad only at one end; that its purpose is to serve an industry.

Petitioner seeks to bring this within the facts which controlled the decision in *T. & P. Ry. Co.* v. *Gulf*

C. & S. F. Ry. Co., 270 U. S. 266, 70 L. Ed. 578. This court in that case said:

> "The carrier was authorized by Congress to construct without authority from the Commission 'spur, industrial, team, switching or side tracks * * * to be located wholly within one state.' Tracks of that character are commonly constructed either to improve the facilities required by shippers already served by the carrier or to supply facilities to others who being within the same territory and similarly situated are entitled to like service from the carrier."

The court's language here, "to improve the facilities required by shippers already served" or "to supply facilities to those within the same territory and entitled to like service," states the distinguishing feature of these spur, etc., tracks.

We find the track answers the description of a spur track given in the first case where the question came before the courts, *Detroit & M. Ry. Co.* v. *Boyne City G. & A. Ry. Co.*, 286 Fed. 546. There the court said:

> "The distinguishing feature between 'extensions' and 'new lines' on the one hand and 'spur, industrial, team, switching or side tracks,' on the other as used in this act is this, that the former are tracks over which there are to be train movements in the sense that such movements are a part of the transportation haul from shipper to consignee, while the latter named tracks are for use in loading and unloading, storing and switching."

The map in the record will show that the Dixie plant was accessible to this respondent's main line

(which is located about one mile northwest of said plant) as well as to the tracks of the petitioner. Respondent, by building a spur track from this said main line across intervening vacant lands, could reach the Dixie plant. Also reference to that map will show that the intervening territory is no more tributary to the petitioner's tracks than to respondent's. It simply lies between the petitioner's and the respondent's tracks and equally open to both for development as industrial plants. There is therefore no invasion by respondent of petitioner's territory such as was found to be the fact (on very elaborate testimony which is altogether absent in this case because the question was not in issue) in *T. & P.* v. *Gulf C. & S. F., supra.*

The track was "to supply facilities to those within the same territory and entitled to like service" from respondent as plants already being served by respondent.

Nor does the building of the proposed track north of and parallel to petitioner cut the latter off from access to the territory. The spur track of petitioner which this respondent has asked to cross would still extend on the north and east side of this respondent's proposed track and give complete access equal with respondent to all vacant industrial territory north and east of respondent's proposed track. And, of course,

petitioner's lead track west of respondent's proposed track would give access equally with respondent to all of the vacant territory lying west of respondent's proposed track.

Dated Little Rock, Ark., Jan. 11, 1933.

EDWARD J. WHITE,
ROBERT E. WILEY,
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 364.—October Term, 1932.

St. Louis Southwestern Railway Company, Petitioner, *vs.* Missouri Pacific Railroad Company. } On Writ of Certiorari to the Supreme Court of Arkansas.

[March 27, 1933.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Constitution of Arkansas, Article XVII, sec. 1, declares: "Every railroad company shall have the right with its road to intersect, cross and connect with any other road." A statute provides that the Railroad Commission "shall have exclusive power to determine and prescribe the manner, including the particular point of crossing and the terms of installation, operation, maintenance, apportionment of expenses, use and protection of each crossing of one railroad by another railroad. . . ." Act April 1, 1919, p. 411, sec. 9; Crawford & Moses Digest, sec. 1643.

Proceeding under that statute, without first obtaining from the Interstate Commerce Commission a certificate of public convenience and necessity under paragraph 18 of § 1 of the Interstate Commerce Act as amended by Transportation Act, 1920,[1] the Missouri Pacific Railroad applied to the Arkansas Commission for a crossing with an industrial track of a spur of the St. Louis Southwestern Railway at grade, at a point in North Little Rock—the crossing to be constructed at the applicant's expense and in accordance "with the terms of installation, operation, maintenance and protection of such crossing as may be fixed by" the Commis-

[1] "No carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, . . . unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad. . . ." Act of February 28, 1920, c. 91, § 402 (18), 41 Stat. 456, 477.

sion. At the hearing thereon the St. Louis Southwestern appeared in opposition; but it filed no pleading and made no statement as to the ground of its opposition.

Both companies are interstate carriers. The record of the proceedings before the Arkansas Commission occupies 82 pages of the printed record. But there is in it nothing which indicates that either party had then in mind any question arising under the Interstate Commerce Act. The application to the Arkansas Commission alleged that the Missouri Pacific hauls over its extensive system most of the traffic to and from the plant of the Dixie Cotton Oil Mills at North Little Rock; that in order to handle this traffic, cars must now be switched from or to its lines for a distance of 500 feet over tracks of the St. Louis Southwestern; that if the Missouri Pacific were enabled to reach the plant wholly over its own lines, operations would be facilitated; that to this end it had arranged to build to the plant a spur 5,460 feet long; and that to make this connection with its main line the crossing is necessary. At the opening of the hearing, counsel for the Missouri Pacific asked leave to amend the application by alleging that the proposed industrial track would be "an industrial lead throughout its entire length, for the service of the public generally, and operation and serving of industries that may be located in this new territory"—that is, an industrial track from which switches would lead to new industries that might be located there.

The St. Louis Southwestern objected to the allowance of the amendment; its objection was sustained by the Commission; and its counsel stated that the introduction of any evidence of the purpose to make the track an industrial lead would be objected to. But as the hearing proceeded there was evidence (brought out largely through the cross-examination by the St. Louis Southwestern's counsel) that it was the hope of the Missouri Pacific that the proposed track would ultimately be used as an industrial lead track. The Arkansas Commission denied the Missouri Pacific's application to fix the place and manner of the crossing. Why it did so does not appear. It rendered no opinion; and its order stated merely that "having heard all the evidence" and "after having made a personal inspection of all the physical properties described in the petition and involved in this proceeding, [the Commission] is of the opinion that said application should be denied." A rehearing sought was also denied without opinion or other indication of the reason for the Commission's action.

From the order, and upon the record made before the Commission, the Missouri Pacific appealed to the Circuit Court of Pulaski County. Act of February 15, 1921, p. 177, § 20; Crawford & Moses Digest (Castle's 1927 Supp.), §8417z3. There, the St. Louis Southwestern set up, by requests for findings and rulings, several objections to the granting of the application. Among them, was a request to find that the proposed track of the Missouri Pacific was an extension of its lines into new territory, as distinguished from a spur to an industry; and to rule that, for this reason, the track could not be lawfully built or used without first procuring from the Interstate Commerce Commission a certificate of public convenience and necessity. The Circuit Court refused to make the finding and ruling requested; held that the Missouri Pacific was entitled to the crossing as prayed for; and directed the Commission to take action accordingly. The St. Louis Southwestern then appealed to the Supreme Court of Arkansas; and, besides a claim based wholly on the state law, insisted that the Arkansas Commission was without power to fix the point and manner of crossing, since no certificate of public convenience and necessity had been secured from the Interstate Commerce Commission. That court, in affirming the judgment, held specifically that the proposed track was a spur located wholly in the State of Arkansas, within the meaning of paragraph 22 of § 1 of the Interstate Commerce Act[2], and so not subject to the requirement of a certificate from the federal Commission. — Ark. —. Because of the decision of that federal question certiorari was granted. 287 U. S. —.

The St. Louis Southwestern asks us to reverse the judgment on the ground that upon the evidence introduced before the Arkansas Commission the proposed track should be held to be an extension of the Missouri Pacific's line into new territory, within the meaning of paragraph 18, as applied in *Texas Pacific R. R. Co.* v. *Gulf, Colorado & Santa Fe R. R.*, 270 U. S. 266. The Missouri Pacific insists that its right to the crossing cannot be questioned in this proceeding, which is limited to fixing the place and manner of the crossing; that under the state practice its right to a crossing could be challenged only by an independent suit—a bill in equity;

[2] "The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one State. . . ." Act of February 28, 1920, c. 91, § 402 (22), 41 Stat. 456, 478.

that, in any event, the judgment should be affirmed, because, if the character of the proposed track is relevant in this enquiry, the Supreme Court properly held it to be a spur; and that since it is located wholly within the State of Arkansas, the Interstate Commerce Commission had no authority over its construction.

The Supreme Court of Arkansas stated in its opinion the contentions of the St. Louis Southwestern and then proceeded to answer them. The contentions stated were that "the circuit court erred in directing the Commission to fix the point and manner of crossing, because first: under the statute it has no authority to act until appellee acquires the right of way by condemnation proceedings, and second: until it obtains a certificate of convenience and necessity for the crossing from the Interstate Commerce Commission." That court's answers to the contentions were: First, that the right to the crossing exists under the state constitution and that "the orderly way would be to first fix the place and manner of crossing and then proceed in the proper tribunal to condemn the land needed to effect the crossing at the place fixed or designated." Second, that upon the evidence the proposed track, which is located wholly within Arkansas, is a spur; and being so, it was unnecessary to secure the certificate from the Interstate Commerce Commission. Thus, the Arkansas court decided the case by determining the character of the proposed track, without expressly passing upon, or so far as appears considering, the question whether that federal issue was relevant in the proceeding under review.

We think that it was not relevant. If the proposed track is believed to be an extension, the remedy is not by way of defense to an application to fix the place and manner of the crossing. The statute of Arkansas which confers upon the Railroad Commission exclusive power to determine the place and manner of crossing antedates Transportation Act, 1920, which introduced paragraphs 18 to 22 of § 1 of the Interstate Commerce Act. The St. Louis Southwestern does not contend that the law of Arkansas requires denial of the application in the absence of a certificate from the Interstate Commerce Commission. It contends that the federal law requires the state commission to refrain from fixing the place and manner of crossing unless a certificate for building the proposed track shall have been secured from the Interstate Commerce Commission. There is no basis for such a contention. Transportation Act, 1920, which confers upon an interested carrier the

right not to be subjected to such new competition unless it is found to be in the public interest, prescribes the remedy for the protection of that right. The remedy prescribed is a proceeding to enjoin. Paragraph 20 of § 1 declares that "any construction or operation" contrary to the provisions of paragraphs 18, 19 or 20 "may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest." That procedure affords an opportunity "to secure an orderly hearing and proper determination of the matter," *Western Pacific California R. R. Co.* v. *Southern Pacific Co.*, 284 U. S. 47, 52; and the remedy is "both affirmative and complete," *Texas Pacific R. R. Co.* v. *Gulf, Colorado & Santa Fe R. R. Co.*, 270 U. S. 266, 273.[3] The propriety of requiring resort to the remedy by injunction is illustrated by the proceedings in the case at bar. The question whether the proposed track is a spur or an extension has been decided by the Supreme Court of the State upon a record made before the state commission although, so far as appears, the issue was not raised there and neither that body nor the parties treated it as relevant.

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[3]The method prescribed by paragraph 20 was pursued in the following cases: Texas *v.* Eastern Texas R. R. Co., 258 U. S. 204; Smyth *v.* Asphalt Belt Ry. Co., 267 U. S. 326; Texas Pacific R. R. Co. *v.* Gulf, Colorado & Santa Fe R. R. Co., 270 U. S. 266, 273; Alabama & Vicksburg Ry. Co. *v.* Jackson & Eastern Ry. Co., 271 U. S. 244; Texas & N. D. R. R. Co. *v.* Northside Belt Ry. Co., 276 U. S. 475; Western Pacific California R. R. Co. *v.* Southern Pacific Co., 284 U. S. 47; Claiborne-Annapolis Ferry Co. *v.* United States, 285 U. S. 382, 391-392; Piedmont & Northern Ry. Co. *v.* Interstate Commerce Commission, 286 U. S. 299; Detroit & M. Ry. Co. *v.* Boyne City, G. & A. R. R. Co., 286 Fed. 540; El Dorado & W. Ry. Co. *v.* Chicago, R. I. & P. Ry. Co., 5 F. (2d) 777; Detroit Terminal R. R. Co. *v.* Pennsylvania-Detroit R. R. Co., 15 F. (2d) 507; Missouri-Kansas-Texas R. R. Co. *v.* Northern Oklahoma Rys., 25 F. (2d) 689; Missouri Pacific R. R. Co. *v.* Chicago, R. I. & P. Ry. Co., 41 F. (2d) 188; Bremner *v.* Mason City & C. L. R. R. Co., 48 F. (2d) 615; Missouri Pacific R. R. Co. *v.* Union Pacific Ry. Co., 60 F. (2d) 126; Marion & E. R. R. Co. *v.* Missouri Pacific R. R. Co., 318 Ill. 436; compare State *v.* Atlantic Coast Line R. R., 116 So. 48. No case in the federal courts has been found in which any other method was pursued to secure relief against what was believed to be an unauthorized extension. Compare, however, Seaboard Air Line Ry. *v.* Tampa Southern R. R. Co., 97 Fla. 340. In Missouri Pacific R. R. Co. *v.* Chicago, R. I. & P. Ry. Co., 41 F. (2d) 188, cited above, the relief sought and granted was an injunction against unauthorized construction and also against prosecution before the Arkansas railroad commission of a petition for a crossing.

Confining the St. Louis Southwestern to the remedy prescribed by Transportation Act, 1920, does not abridge the protection of its rights. If the proposed track is a spur, the question of the place and manner of the crossing presents a purely local problem to be decided by the state commission under the laws of the State, unless a claim were made that by allowing a crossing at grade the operation of trains in interstate commerce over the spur of the St. Louis Southwestern would be obstructed. The record is barren of any such suggestion. If the proposed track is an extension, the order of the state commission does not impair the right of the St. Louis Southwestern to be free from invasion of its territory unless the extension is in the public interest. The application to the Arkansas commission is not for leave to build the track or for leave to use it; it is solely to have fixed the place, manner and terms of the crossing. The order of the state commission does not purport to authorize the construction of the track, or its use when constructed. It would seem that a proposed larger use of the track, if an industrial lead and not a spur to a single industry, might well have been deemed relevant to the state commission's determination of the appropriate place and manner of crossing. But its determination of that matter in no way concludes the federal claim of the St. Louis Southwestern here asserted. And postponement of the determination whether the track is a spur or an extension will prejudice no federal right of the St. Louis Southwestern. If the track should be held in the later proceeding to be a spur, obviously the St. Louis Southwestern will have no ground to complain of the order of the state commission. If the track is held to be an extension, that order will not become effective unless the Missouri Pacific should secure a certificate from the Interstate Commerce Commission. Indeed, the prior determination by the state commission of the place, manner and terms of the crossing may, by making the plan more concrete and definitive, aid the federal commission in reaching an informed judgment on the application. Compare *Los Angeles Passenger Terminal Cases*, 100 I. C. C. 421, 459.

For the reasons stated, we are of opinion that the judgment of the Supreme Court of Arkansas, as it directed merely that an order be entered fixing the place and manner of the crossing, is not in conflict with the federal law, whether the proposed track is a spur or an extension; and that in passing upon the character

of the track, the state court determined a federal question not pertinent to the decision of the case. It was stated at the bar that there is now pending, in the federal court for Arkansas, a suit commenced by the St. Louis Southwestern, under paragraph 20 of § 1 of the Interstate Commerce Act, to enjoin construction of the proposed track on the ground that it is an extension. Since the question whether the proposed track is a spur or an extension was not pertinent to the decision of this case in the state courts, and as we necessarily refrain from passing on that question, it follows that neither the judgment of the Supreme Court of Arkansas, nor the judgment of this Court, will operate as *res judicata* on that issue. As thus defined the judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.